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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1738

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Richard Nixon petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The district court's order of March 26, 1980, denying petitioner's motion for summary judgment on grounds, *inter alia*, of absolute immunity from suit for civil damages arising from actions taken as President (App. A, *infra*, 1a-5a) is not yet officially reported. The order of the court of appeals granting respondent's motion

to dismiss the appeal of the district court's order (App. D, *infra*, 35a-36a) is not yet officially reported.

JURISDICTION

The order of the district court petitioner seeks to have reviewed was entered on March 26, 1980. On April 10, 1980, petitioner filed a timely notice of appeal from that order in the district court. The case was docketed in the United States Court of Appeals for the District of Columbia Circuit on April 14, 1980. *Fitzgerald v. Butterfield, et al., Richard Nixon, appellant,* No. 80-1407. On April 24, respondent filed a motion to dismiss the appeal or for summary affirmance, citing *Halperin, et al. v. Kissinger, et al.*, 606 F.2d 1192 (D.C. Cir. 1979), as the controlling law on the issue being appealed. The motion to dismiss was granted April 30, 1980. The jurisdiction of this Court to review the instant case is invoked under 28 U.S.C. 1254(1) and 2101(c), and the collateral order doctrine expressed in *Helstoski v. Meanor,* No. 78-546 (June 18, 1979); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Coopers & Lybrand v. Livesay,* 437 U.S. 463, and *Forsyth v. Kleindienst,* 599 F.2d 1203, 208 (3d Cir. 1979), *pet. for cert. filed, sub nom. Mitchell v. Forsyth,* No. 79-1120 (January 18, 1980).

QUESTIONS PRESENTED

1. Whether a President is absolutely immune from civil damage liability for actions taken, or for failures to act, while President of the United States.

2. Whether the decision of the district court denying a President the defense of absolute immunity from civil damages and ordering trial to commence on the merits is appealable as a collateral order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent's claims against petitioner are based upon the First Amendment, 5 U.S.C. § 7211, 18 U.S.C. § 1505, and the District of Columbia's common law torts of intentional infliction of mental distress and interference with advantageous economic relationships. The texts of the constitutional and statutory provisions are reprinted in Appendix B.

STATEMENT

This case presents for review the identical issue concerning a President's liability for civil damages raised by the Solicitor General on Mr. Nixon's behalf in *Kissinger, et al. v. Halperin, et al.*, No. 79-880 (filed December 7, 1979). It raises the issue, however, in the context of a civil service employee whose employment was terminated by the Air Force in an executive branch reorganization and who claims that Mr. Nixon is liable for money damages because he either approved the decision to fire him or failed to reinstate his employment after being informed that the termination was retaliatory.

RESPONDENT'S LOSS OF EMPLOYMENT

Two months before the end of President Johnson's term in office, Ernest Fitzgerald, then Deputy Assistant Secretary for Management Systems of the Department of the Air Force, met with staff members of Senator

Proxmire's Subcommittee for Economy in Government and discussed Mr. Fitzgerald's assessment of the potential cost overruns in the military's development of the C-5A air transport. Shortly after that meeting, Fitzgerald was asked to appear in public session before the subcommittee and there revealed that, in his opinion, the Defense Department was facing approximately $2 billion in development costs beyond original estimates.

Following that testimony, Fitzgerald received notification that his career civil servant status, which he had received shortly before the date of his congressional testimony, was being revoked. This incident in the closing days of the Johnson Administration prompted subsequent congressional hearings into the matter, at which time officials of the Defense Department, including the new Secretary of Defense, Melvin Laird, assured committee members that Fitzgerald would not be subjected to retaliation.

Nearly a year after his testimony, in connection with a general reorganization of the Department of the Air Force and a reduction in defense and government manpower generally, Fitzgerald's job was abolished and his employment terminated. The reorganization was announced November 3, 1969, effective January 5, 1970. Because of the publicity surrounding Fitzgerald's congressional testimony and the revocation of his career status by the prior administration, President Nixon's staff anticipated that he would be questioned about the Air Force's action at his next scheduled press conference on December 8, 1969. In preparing the President for the press conference, the staff submitted several memoranda outlining the fact that Fitzgerald's job had been abolished and warning that this action would be perceived by the public and press as retaliatory. Because

Fitzgerald's C-5A disclosures were not an embarrassment to the Nixon Administration, two staff members recommended that the President overrule the Secretary of the Air Force and order Fitzgerald reinstated, or that Fitzgerald be found other government employment in an area separated from those with whom he had evidently developed an antagonistic relationship.

After the December 8, 1969 press conference at which he was in fact asked about and promised to look into Fitzgerald's situation, President Nixon requested that Fitzgerald be given a job in the White House Bureau of the Budget. When BOB Director Robert Mayo counseled that such a position would be unwise because of Fitzgerald's reputed status as a pipeline to Senator Proxmire, President Nixon did not press the matter, but instead requested that his staff pursue other alternatives. However, he never overruled the Air Force's decision to terminate Fitzgerald. On January 5, 1970, Mr. Fitzgerald left government employment without an offer of another position.

RESPONDENT'S C.S.C. LITIGATION

Fitzgerald challenged his termination before the Civil Service Commission and, in 1973, an evidentiary hearing was held concerning that matter. During those hearings Air Force Secretary Seamans testified that he had made the decision to include Fitzgerald's job among those eliminated in the reorganization plan based upon recommendations from his staff. On grounds of executive privilege, Seamans refused to disclose any advice he had received from the White House concerning that decision.

A reporter, Clark Mollenhoff, who was covering the 1973 CSC proceedings and who in 1969, as a member of the White House staff, had recommended to President

Nixon that Fitzgerald's employment be continued, confronted President Nixon about Seamans' invocation of the privilege at a scheduled press conference the next day. In the exchange between Mollenhoff and the President that followed, Mr. Nixon stated that he personally had made the decision to terminate Fitzgerald and that he stood by it. In conversations with his staff following the press conference Mr. Nixon discovered that he had confused Mr. Fitzgerald with another individual. This discovery prompted a retraction the next day by the President's press secretary.[1]

The CSC hearings then in progress continued for several more weeks. At their conclusion, the hearing examiner found that although Fitzgerald's termination was not in retaliation for his congressional appearances, it nevertheless involved personal factors unique to him. Consequently, the elimination of his job under the rubric of a reorganization was declared invalid, and Fitzgerald was ordered reinstated by the Air Force to the same or an equivalent position. He was also awarded back pay to the date of his termination.

RESPONDENT'S CIVIL SUIT

Claiming that the CSC's action was inadequate to compensate him for the damages he had suffered, Fitzgerald commenced a civil action in January 1974 against various Defense Department personnel, including Air Force

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[1]The record in this case includes transcripts of the several tape recorded private conversations in the Oval Office, after the press conference, in which Mr. Nixon discovered his error. Fitzgerald contends that the dialogue is ambiguous and that he is entitled to have a jury decide, as a factual matter, whether Mr. Nixon erred in saying that he had ordered Fitzgerald fired. The transcripts of those conversations prepared by the National Archives are reprinted in Appendix C.

Secretary Seamans. Based upon an internal White House memorandum to other staff members, written by Alexander Butterfield in January 1970, in which he advocated that Fitzgerald not be given another job in the government, Butterfield was included in the suit as an alleged co-conspirator. Because the suit was commenced more than three years after the effective date of Fitzgerald's termination, the district judge granted the defendants' motions for summary judgment based on the statute of limitations. *Fitzgerald v. Seamans, et al.*, 384 F. Supp. 688 (D.D.C. 1974). The court of appeals affirmed as to all Defense Department personnel, but concluded that because Fitzgerald had no reason to know prior to 1973 of any White House involvement in the decision to fire him, Fitzgerald's claim against White House personnel was not barred. *Fitzgerald v. Seamans, et al.*, 553 F.2d 220 (D.C. Cir. 1977).

On remand, nine years after his employment was terminated, Fitzgerald amended his complaint to add as defendants Mr. Nixon and Bryce Harlow, who had served as both an Assistant and Counsel to the President for congressional relations. Fitzgerald claims that the defendants conspired to violate his First Amendment rights and to punish him for testifying before Congress. At this stage the district court has ruled that the complaint not only states a claim under the First Amendment, but that the case also can proceed to trial in June based upon implied causes of action under 5 U.S.C. § 7211 (employees' right to petition Congress) and 18 U.S.C. § 1505 (injuring a congressional witness is a felony). In addition, the district court has held that the complaint adequately states causes of action under the District of Columbia's tort law for intentional infliction of mental distress by outrageous conduct and intentional inter-

ference with economic advantage. Fitzgerald is seeking $500,000 in compensatory damages and three million dollars in punitive damages.

THE DISTRICT COURT'S DECISION

Upon Mr. Nixon's being named as a defendant in the action, the Justice Department moved on his behalf to dismiss the complaint or for summary judgment on grounds that a former President is entitled to absolute immunity from civil liability for the actions Fitzgerald alleges. Judge Gesell, who subsequently sat by designation as a member of the court of appeals' panel that ruled adversely to Mr. Nixon in *Halperin, et al. v. Kissinger, et al., supra,* denied the motions based on the state of the record at that point. After extensive discovery by all parties, Mr. Nixon renewed his motion for summary judgment. In the interim, the court of appeals issued its decision in *Halperin, et al. v. Kissinger, et al., supra.* Citing that decision as the law in the circuit on the issue of absolute presidential immunity, Judge Gesell denied the summary judgment motion. (App. A, *infra*, 1a-5a.)

Because an order denying the defense of absolute immunity is appealable as a collateral issue (*see* note 2, *supra*), Mr. Nixon filed a timely notice of appeal as to that issue. He also moved to stay the trial, which is scheduled to begin on June 4, pending this Court's decision on the petition in *Kissinger.* The district court denied the motion.

THE COURT OF APPEALS' DECISION

Ten days after the appeal was docketed, and while petitioner was readying a petition for certiorari before judgment directed to the absolute immunity issue, respondent filed a motion to dismiss the appeal or

for summary affirmance of the district court's order. Respondent argued that there was no jurisdiction for the appeal because the absolute immunity issue was not "an unsettled question" in the District of Columbia Circuit in view of that court's decision in *Halperin, et al. v. Kissinger, et al., supra,* and thus did not qualify as a final order under the "collateral order" doctrine. On April 30, 1980, the court of appeals, without stating the basis for its decision, granted the motion to dismiss the appeal. (App. D, *infra,* 35a-36a.)

REASONS FOR GRANTING THE PETITION

1. This case presents not only an unsettled issue which the Solicitor General has described as of exceptional importance to the functioning of the Presidency but one which will continue to arise with increasing frequency until this Court resolves it. The petition for certiorari in *Kissinger* presents for this Court's review the first case in which an appellate court has ever ruled that a President of the United States may be held personally liable in money damages for the actions he takes during his conduct of that office. The Solicitor General has persuasively articulated the far-reaching ramifications of the *Kissinger* decision and has effectively demonstrated the absence of sound legal or policy justification for the court of appeals' departure from prior judicial rulings on this point. Among other things, the Solicitor General has noted that the court of appeals' action places all future Presidents in the intolerable position of having to make every decision in contemplation of the fact that at some later stage an aggrieved party will ask a district court and jury to sit in judgment of his conduct and will be forced to defend at great expense the correctness of his actions.

We will not reiterate the manifold reasons the Solicitor General has provided the Court for granting certiorari on this issue. They are compelling, and petitioner adopts them in whole. The purpose of this petition is to alert the Court that there are cases, such as this, already pending which illustrate the detrimental impact of the court of appeals' denial of an absolute immunity defense to a President. For several reasons this case presents an ideal vehicle for the members of this Court to consider the issue. Therefore, we urge that the Court grant both the petitions here and in *Kissinger*, thereby viewing the issue not only in diverse contexts but in the kind of situations that are certain to follow should the President not be afforded absolute immunity from civil damage claims.

2. The respondent in *Kissinger* has opposed the petition in that case arguing that the factual circumstances there are so unique that the court of appeals' decision does not establish a broad-based precedent likely to spawn damage suits against other Presidents. This case proves otherwise. Although this case, too, is against Mr. Nixon, it does not involve any of the activities cited by the House of Representatives in the articles of impeachment, nor is the alleged conduct such as to have invoked widespread public disapprobation. To the contrary, it arises out of the very kind of activities a President confronts daily and, given the pressures of the President's immense responsibilities, it demonstrates that a mistaken judgment on what at the moment may seem to be a trivial matter—indeed, an internal executive branch personnel dispute—can later threaten his entire personal estate.

In this particular case it is an aggrieved civil servant who claims that the President either approved his unlaw-

ful termination or failed to reinstate his employment. Out of that alleged "approval" or "failure to reinstate," respondent has spun one constitutional, two implied statutory, and two common law causes of action. While the parties dispute whether Mr. Nixon ever "approved" the decision to terminate Fitzgerald, there is no question but that he "failed to reinstate" him. The district court found these allegations sufficient to allow the jury to decide not only whether Mr. Nixon should be held liable for actual damages, but also whether he should suffer the additional burden of punitive damages because he acted with malicious intent.

If, as this case illustrates, a President can be required many years after the fact to establish that his actions or failures to act were benevolent, no President can govern without constant concern for his own and his family's future financial security. What at present is a suit by a civil servant may well become a suit by an Olympic athlete who claims that the President has intentionally violated his rights in precluding him, but not others, from traveling to the Soviet Union. What today is a suit by a White House staff member whose phone has been tapped to discover the source of leaked information, may become a suit by a foreign service employee claiming that he was held hostage for an excessive period while the President delayed remedial action for political purposes or prolonged his imprisonment by conducting a military action without complying with the War Powers Act. Once the barrier against suing a President for damages is removed, no theory of liability remains implausible. The case can be brought, and if the trial court is sympathetic, it can be pursued to the point of the President either attempting to prove his good faith to a jury, or having to compromise the suit in order to

avoid financial ruin. In either case, the costs, not only to the individual but to the public in terms of impairing the President's decisionmaking ability, are enormous.

3. The court of appeals in *Halperin, et al. v. Kissinger, et al., supra,* suggested that the safeguard against vexatious lawsuits against high government officials who, in that court's view, are entitled only to qualified immunity, is to be found in the district court's sensitivity to that problem. (*Kissinger,* Pet. for Cert., App. A, 38a-41a.) However, this case shows the practical ineffectiveness of such an admonition to the district courts. Ironically, it was Judge Gesell, sitting as a member of the appellate panel in *Kissinger,* and later bound, of course, by the majority's opinion, who pointed out that disposing of a case against a President at the pre-trial stage on qualified, rather than absolute, immunity grounds is virtually impossible and comes at great expense to the functioning of our government. (*Halperin,* App. A, 51-52.)

> We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the [qualified]

immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits.

The effect of this development upon the willingness of individuals to serve their country is obvious. Not only are the personal funds of such officials placed at hazard but many of these cases are political in character, involve highly controversial acts, and will necessarily embroil juries in passing upon the intricacies of executive decisionmaking.

4. The respondent in *Kissinger* also argues against a grant of that petition because a resolution of the absolute immunity issue there in the petitioners' favor would apply only to the constitutional, not the Title III claim. In this case, because the district court has upheld Fitzgerald's right to sue petitioner for alleged violation of two District of Columbia common law provisions, this case even opens the door to litigation in any state court in which a plaintiff can find a sufficient nexus to gain *in personam* jurisdiction over the President. Consequently, this case permits the Court to decide whether a President is entitled to absolute immunity from all types of causes of action for damages.

5. The dismissal of the appeal below does not impair the Court's ability to grant certiorari on the absolute immunity issue.[2] The district court's order

[2]We recognize that the Court could grant certiorari on the appealability issue, reverse the order dismissing the appeal, and

[footnote continued]

which, based upon the court of appeals' earlier ruling in *Halperin, et al. v. Kissinger, et al., supra,* refused to recognize a President's right of absolute immunity from civil damage liability raises a collateral issue for which appellate jurisdiction is available under 28 U.S.C. § 1291. *See Helstoski v. Meanor,* No. 78-546 (June 18, 1979); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541; *Coopers & Lybrand v. Livesay,* 437 U.S. 463. The Court concluded in *Helstoski, supra,* that an order denying the defendant absolute immunity based on the Speech or Debate Clause was final for purpose of appeal because there was nothing further to be done in the district court on the matter, and in the absence of an opportunity to appeal at that stage the purpose of the defense would be nullified. The same is true here. The purpose of the absolute immunity defense for a President is to obviate the need for him to justify his actions to a jury at a civil trial. The district court's refusal to recognize that defense constitutes a final determination of the matter, and if trial proceeds, the purpose undergirding the defense in negated.[3]

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remand the case to the court of appeals for consideration of the absolute immunity issue. However, in view of the fact that it is the District of Columbia Circuit Court of Appeals' decision on absolute immunity for a President that is already pending before this Court on a petition for certiorari in *Kissinger,* there is no reason to believe that further review by the court of appeals is necessary in this case. Consequently, granting certiorari as to the immunity issue now would be the equivalent of granting certiorari before judgment following a remand.

[3]The court of appeals' dismissal of the appeal for lack of jurisdiction creates a split in the circuits on the question of whether an order denying the absolute immunity defense is appealable before trial. *See Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir. 1979), *pet. for cert. filed, sub nom. Mitchell v. Forsyth,* No. 79-1120 (January 18, 1980), and *Clark, et al. v. United States,*

[footnote continued]

6. The necessity for granting the petition for certiorari is particularly acute in this case. The trial, which is estimated to last four weeks, will involve approximately fifty witnesses, and which will entail disrupting the affairs of government officials from three administrations, including members of President Carter's staff, is now scheduled to commence June 4. The trial judge has refused to postpone the trial date even pending this Court's action on the petition in *Kissinger*. A principal purpose of the absolute immunity defense for a President, of course, is to protect him from having to commit himself and his personal resources to defending before a jury the correctness of his decisions while in office. Deferring consideration of this petition or the absolute immunity issue in this case until after the June trial would be tantamount to denying the defense without consideration of its merits. For that matter, should petitioner prevail at trial there is no assurance that the immunity issue would again reach this Court, particularly in the pristine form it is now presented. Yet, even if petitioner is successful on the merits, he will have incurred, without remedy, the very expense and exposure to financial jeopardy that the absolute immunity defense is intended to obviate. Thus, both as a matter of law and of practical necessity, the case is in the best possible procedural posture at this moment for review of the absolute immunity issue.

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481 F. Supp. 10 (S.D.N.Y. 1979), 2d Cir. Nos. 80-6016, 80-6024 (motions to dismiss for lack of jurisdiction, denied March 11, 1980). Indeed, the court of appeals' decision in this case is inconsistent with another decision of that court. *See McSurely v. McClellan*, 521 F.2d 1024 (D.C. Cir. 1975), *en banc*, 553 F.2d 1277 (D.C. Cir. 1976). This inconsistency in the circuits constitutes additional grounds for granting the writ.

CONCLUSION

The petition for a writ of certiorari should be granted, together with the petition in *Kissinger*, and the cases should be consolidated for purpose of argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178
[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

ORDER

Upon consideration of defendants' motions for summary judgment, the opposition thereto, and the entire record herein, it is hereby

ORDERED that defendants' motions are denied in the following respects:

A. Causes of Action

For reasons set forth more fully in the Court's Order of April 27, 1979, plaintiff has stated the following triable causes of action against each of the three defendants.

1. Plaintiff states a cause of action for damages under the First Amendment to the United States Constitution based on defendants' alleged retaliation for plaintiff's having exercised his rights of free speech and petition.

2. Plaintiff states a cause of action for damages under 5 U.S.C. § 7211 (1976 & Supp. II, 1978).

3. Plaintiff states a cause of action for damages under 18 U.S.C. § 1505.

4. Plaintiff states a cause of action under District of Columbia law for intentional infliction of mental distress by extreme and outrageous conduct.

5. Plaintiff states a cause of action under District of Columbia law for intentional interference with (existent and prospective) economic advantage.

The gravamen of the alleged conspiracy is the participants' knowing intent to terminate plaintiff's employment with the Air Force and to prevent his reinstatement as a government employee in retaliation for his congressional testimony. Summary judgment for a defendant at this stage requires him to show either that he lacked knowledge that the adverse personnel actions taken were retaliatory, or that he lacked an intent to approve this specific aspect of government conduct, or that he took no action in furtherance of such a dismissal and/or obstruction. Plaintiff has established genuine issues of fact as to each of these matters regarding the conduct of all three defendants. Thus, these are issues for the jury to resolve.

B. Immunity

Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979). In order to establish qualified immunity, each defendant must show that he was acting "within the outer perimeters" of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. *Butz v. Economou*, *supra*; *Halperin v. Kissinger*, *supra*. *See Wood v. Strickland*, 420 U.S.

308 (1975). Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct.

In analyzing the reasonableness of defendants' beliefs as predicates to the alleged wrongful conduct, the Court has considered the unique demands placed on the time and energies of defendant Nixon as President. *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974); *Halperin v. Kissinger*, *supra*, 606 F.2d at 1212-13. There is, however, ample evidence in the record that Fitzgerald's predicament was not simply one of a disgruntled civil servant. Both members of Congress and the press identified plaintiff's case as being of great public importance throughout 1969. Factual circumstances surrounding his termination were repeatedly raised for the President's attention. Moreover, the conduct complained of has long been prohibited by criminal statute, a statute to which Mr. Nixon personally gave strong support while a member of the United States Senate. The Court is unable to conclude at this time that Nixon's beliefs regarding any alleged failure to meet a statutory or constitutional obligation imposed on him were reasonable as a matter of law.

C. Punitive Damages

Punitive damages may be awarded against any defendant whose actions in contravention of statutory or common law have been shown to be malicious or in reckless disregard for the rights of others. *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1002 (D.C. Cir. 1976); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549-51 (D.C. Cir. 1975), *reversed on other grounds*, 426 U.S.

290 (1976). Because genuine issues of fact remain with respect to the subjective good faith underlying each defendant's conduct, it has not been established that such damages are unavailable as a matter of law. Should the facts of this case developed at trial warrant an award of punitive damages, such an award would be recoverable at common law or under plaintiff's statutory claims. A similar recovery based on any finding of First Amendment violations does not appear to be constitutionally interdicted. *See generally Dellums v. Powell*, 566 F.2d 167, 209 (D.C. Cir. 1977) (Leventhal, J. concurring); *Payne v. Government of Dist. of Columbia*, 559 F.2d 809, 827-27 (Tamm, J. concurring).

D. Statute of Limitations

The motions based on the Statute of Limitations are denied for reasons set forth in a separate Memorandum filed herewith.

It is further

ORDERED that defendants' motions for summary judgment are granted in the following respects:

1. Plaintiff having voluntarily withdrawn his claim under the Fifth Amendment to the United States Constitution, this claim is hereby dismissed.

2. Plaintiff having withdrawn his contention that defendants are in any way liable in connection with initiating the 1969 investigation of him by the Air Force Office of Special Investigations ("OSI"), this matter shall not be prosecuted at trial. Evidence regarding the subsequent use of OSI investigation results or charges shall not be admissible at trial absent a clear showing of relevance and good cause.

It is further

ORDERED that the dates and times for pretrials and trials as set by this Court's Order of November 19,

1979, are modified to reflect a change in the time of Pretrial No. 2 and the date of the trial:

First Pretrial: May 2, 9:30 a.m.
Second Pretrial: May 12, at *2:00* p.m.
Final Pretrial: May 22, at 9:30 a.m.
Trial: June *4*, at 9:30 a.m.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-178

[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

MEMORANDUM REGARDING STATUTE OF LIMITATIONS

Plaintiff, a former Air Force weapon systems analyst, seeks relief against former President Nixon and two White House associates in this civil conspiracy damages action stemming from his discharge in 1969. Following years of litigation against a dwindling number of government officials, the Court has for consideration separate motions for summary judgment made on behalf of these three remaining defendants. On the basis of exhaustive discovery, defendants individually claim that plaintiff is barred from proceeding by the applicable three-year Statute of Limitations, D.C. Code § 12-301(8) (1973).

One defendant, Butterfield, was previously dismissed by reason of the Statute of Limitations but reinstated after a protracted appeal, *Fitzgerald v. Seamans*, 553 F.2d 220, (D.C. Cir. 1977). Following remand, defendants Nixon and Harlow were added and the cause of action given greater specificity by a Second Amended Complaint filed September 14, 1978. After limited discovery, the Court on April 27, 1979, denied motions for summary judgment addressed to the Statute of

Limitations issue. It was, however, recognized that further consideration of this vexing issue might eventuate following the additional detailed discovery that has since ensued. The present motions were thoroughly briefed and fully argued upon completion of discovery and preliminary to a series of noticed pretrials that will precede trial in June.

In dealing with these motions this Court is governed by the mandate from the Court of Appeals. Plaintiff's original complaint seeking damages against representatives of the Air Force was found to be time-barred, but, on remand, Butterfield survived as a defendant. The Court of Appeals held that Butterfield, a member of the White House staff, was "a person of influence in a different center of power." Although he was alleged to have conspired with the Air Force defendants, he was held for trial because the record before the appellate court did not compel the view that plaintiff should have been aware of "White House deliberations concerning his government employment" prior to1973. The Court of Appeals recognized that while new Air Force defendants could not be added plaintiff could, by reason of his John Doe allegations, add new White House defendants "subject to the requirement of due diligence." It also was noted that Butterfield's own involvement could be re-examined upon a fuller factual record in the light of the due diligence standard.

As the action now stands, plaintiff proposes to proceed against the three movants, all participants in the White House "center of power." He claims that they conspired with Air Force representatives and with others in the White House to bring about his dismissal by the Air Force and to block his reinstatement to government service in the immediate aftermath of the termination.

Discovery into White House involvement was effectively curtailed in the spring of 1974, following early summary judgment motions from the Air Force defendants. Plaintiff's first meaningful opportunity to resume his inquiries on this score came after remand, and it is not seriously disputed that he proceeded with due diligence from that point. Defendants focus instead on the three-year period following the final events fixing alleged liability, which occurred early in 1970. They argue that by early 1973, plaintiff was on clear notice of facts and circumstances enabling him intelligently to prosecute his cause of action. His failure to proceed at that time is said to bar this action against any White House officials, including the President.

An assessment of plaintiff's diligence in ferreting out White House involvement must take account of the appellate court's conclusion that plaintiff was thwarted by the Air Force's successful claim of executive privilege. The privilege, invoked by Secretary Seamans before the Civil Service Commission when inquiry was directed toward White House participants, could only have been authorized by or on behalf of the President. In other respects, plaintiff's inquiries also have been frustrated or ignored in the interests of White House secrecy.

There is still no proof that plaintiff could have proceeded more diligently against Butterfield. Although Butterfield did nothing himself to conceal his involvement, his alleged participation was not even suspected until his memorandum surfaced during the Senate Watergate hearings in the summer of 1973. Having been shielded from plaintiff's inquiries by the broad mantle of White House secrecy, he was promptly and responsibly joined as a defendant once his presence became known.

In contrast, Harlow's involvement in plaintiff's situation was suspected shortly after the termination.

But as far as Harlow's participation in the conspiracy is concerned, there was no conduct known to plaintiff indicating that he may have affirmatively urged termination or prevented reinstatement to government service. Indeed, plaintiff's prime source of information during this time, Mollenhoff, apparently considered Harlow an ally. Although the evidence is disputed, active concealment by Harlow can be implied on plaintiff's version of the facts. Only much later was plaintiff able to discover what he now alleges was Harlow's true role as part of the conspiracy.

Turning to former President Nixon, the Court confronts a mass of contradictory proof. It is essential in applying the law of diligence to avoid an examination of the proof with hindsight, distorted by subsequent revelations of White House prevarications and duplicity. Undeniably, plaintiff confronted some indicia of "White House involvement" by early 1973, and he voiced certain suspicions concerning the President's role during the Civil Service proceeding. Once again, however, contemporaneous documents suggest an understandable reluctance to attribute personal knowledge and intent-to-harm to the Chief Executive himself. *See, e.g.*, letter from Mollenhoff to Nixon, Feb. 13, 1973, defendant Nixon's exhibit 52.

A personal suit against a sitting President of the United States should never be undertaken lightly, given the deference due his office and all the uncertainties as to his amenability to suit but recently settled by *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). Plaintiff's former counsel apparently believed that Nixon's press conference admission of responsibility and the immediate confusing retraction provided insufficient grounds, and this Court so held when the first summary judgment motions following remand

were decided. Although tapes and other discovery now clearly justify including him as a defendant, the most energetic probing has not disclosed a basis for holding that plaintiff, with diligence, should have proceeded earlier. At most it appears plaintiff had reason to believe that Nixon had been informed of allegations regarding the injustice of plaintiff's termination and had declined to become involved. But even then plaintiff's sources felt the President had somehow been misled. Given all the contemporaneous confusion, the trail to the highest office in the land was murky and the White House continued to conceal.

The motions of each defendant for summary judgment on the grounds that suit is barred by the Statute of Limitations are denied.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

APPENDIX B

UNITED STATES CONSTITUTION

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

5 U.S.C. §7211

Employees' right to petition Congress

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

* * * * *

18 U.S.C. § 1505

§1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended

such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutiliates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

APPENDIX C

Tape: 845b
Meter Reading: 378

TRANSCRIPT OF PART OF CONVERSATION BETWEEN RICHARD NIXON AND CHARLES COLSON

4:17 P.M. January 31, 1973
OVAL OFFICE

President: Like, out there, I was very informal today, you know. I just, you know, talked quite a while when I wanted to. Kidded around with Mollenhoff. [Laughing] He, he sure presses though.

Colson: That was a tough one too—Eh—

P: Well, it's all right, all right.

C: That's one you, one you—

P: That's what I—However, it's his perfect right. It's good to answer [to disarm him] [unintelligible].

C: Well, I'm just delighted you said you wanted a written opinion because (pause) Course I don't know that that Watergate question, you know is (pause) is gonna be a very delicate one (pause). If—

P: Don't we have to have a written opinion?

C: We should have an opinion.

P: Yeah, I don't want to do it off the top of my head.

C: Oh no, no. I was so relieved when you did that because Mollenho—I could tell what Clark was doing. He was, he was working, working around on—

P: Yeah.

C: the Fitzger—

P: This guy that was fired. I'd marked it in the news summary. That's how that happened. I said get rid of

that son of a bitch. You know, 'cause he is, he's been doin' this two or three times. So Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it.

C: Right.

P: But anyway, that's why I didn't back off of that. But, uh, there are areas as far as Watergate's concerned, I can't claim privilege.

Tape: 845b
Meter Reading: 580

TRANSCRIPT OF PART OF CONVERSATION
BETWEEN RICHARD NIXON AND
CHARLES COLSON

4:17 P.M. January 31, 1973
OVAL OFFICE

Colson: And if you get a fluke like the executive privilege thing, the easy answer is—

President: [unintelligible]

Colson: Yes, I invoked it. It was properly invoked under these circumstances, and, uh, if you are confused about my position, I'll be glad to issue a policy statement [unintelligible] on a very complex subject that involves the operation of the Government, period. And move on to something else.

Tape: 845b
Meter Reading: 705

TRANSCRIPT OF PART OF CONVERSATION
BETWEEN RICHARD NIXON AND
JOHN EHRLICHMAN

4:32 P.M. January 31, 1973
OVAL OFFICE

President: Actually I was going to check [unintelligible] curiously enough on Watergate and executive privilege.

Ehrlichman: Well I should've—but I—

P: It didn't make any difference.

E: That's something about [unintelligible].

P: What I, what I, no, what I did make a bit of difference about with Dean; we were talkin' about it and I uh, I was pressed for the moment by our friend—

E: Yeah.

P: [unintelligible] there.

E: Yeah.

P: And I, I think I've handled it in a way that probably is a good thing for us to do. You should have the most godawful gobbledygook answer prepared. Just put it out on executive privilege. Something that will allow us to do everything that we want. Our—

E: I lean—

P: I frankly took the line which uh which uh to give them that or the Congress. I, I want to cooperate the I'm going to have it like Mr. Flanigan. We made him available—

E: Right.

P: and so forth. On the other hand uh we have to stand forth, you understand?

E: I've been making the rounds up there. I've talked to Ervin and all these people and uh that I've been showing them the letter that you wrote Moss back in '69 that says all that same thing.

P: Well, why don't you just brush the letter off and, in order to get it, why don't you just give to Mollenhoff as an exclusive?

E: All right.

P: Why not?

E: Well, the others'll ask Ziegler for it I imagine in due course. But—[unintelligible].

P: [unintelligible] give it to Mollenhoff.

E: And then he can say, uh, he can give that he's asked Ziegler for it.

P: All right. And Mollenhoff puts it out and Ziegler says, yes, Mollenhoff had this thing—

E: Uh.

P: [unintelligible] Clark—

E: Well—

P: won't satisfy 'em.

E: He wasn't doin' you any favors today, I'll tell you that, that it was Mollenhoff saying (pause) goddamn on that specific case.

P: I know that he's been having a problem.

E: Uh.

P: Actually on that case you know I recently recall specifically telling somebody (pause) Harlow.

E: Uh, he talked to Harlow about it I believe, but it uh as we've been reconstructing it—

P: When?

E: When Harlow was here. This case arose way early in the administration.

P: I thought it was a later—

E: No, no, no, no this is that guy that, uh, ratted on the C5A overruns.

P: Oh, yeah.

E: Way back.

P: But he's still in the Government.

E: And, no he's not and uh he's appealed to the Civil Service Commission to be restored.

P: I'm thinkin' of another case. Well, any rate, I backed it up—

E: Yeah.

P: which I shouldn't.

E: Yeah. Well, that was fine and we're—

P: Seamans claimed it.

E: we're coverin' your tracks.

P: I didn't want to have any indication of somebody down the line having [been] used privilege uh without—

E: OK, it's OK, we're coverin' his tracks. Uh, Seamans was wrong, he had no right to invoke it, but you backed him up and we can put it, we can put it together in such a way that everything's OK, and uh, don't worry about it.

Tape: 845b
Meter Reading: 870

TRANSCRIPT OF PART OF CONVERSATION
BETWEEN RICHARD NIXON AND
JOHN EHRLICHMAN

4:32 P.M. January 31, 1973
OVAL OFFICE

President: Uh—let me say that I, I've read this case, John. I'm thinking of another guy, actually, I—I—

Ehrlichman: You're thinking of that Navy fellow that talked about Ash. Yeah, the liti—

P: [unintelligible]

E: —this was four years back.

P: You see I had two names—

E: Yeah.

P: —in my mind. Well, it wasn't, of course, that I—

E: No problem.

P: —didn't really, didn't really know—

E: No problem.

P: —the question. But I had to back up the son of a bitch Seamans.

E: Here's what we've done. Just so you get a feel of it. You know the procedure is if a cabinet officer wants to invoke executive privilege he refers it to the Attorney General.

P: Yeah.

E: —says I won't answer the question now, refers it to the Attorney General—

P: Yeah.

E: —and it eventually comes to you if it's, if it's meritorious. So I—

P: I invoke.

E: That's right, and so what, what we're saying is, by the language that Seamans used, he was beginning that process. Here it goes on. Meantime, he has referred this to the Attorney General. The Attorney General's going to look at it and make a decision as to whether he should answer the question or not. And, you were aware of this fact and you acquiesced in the procedure being started. He made no final ruling.

P: [unintelligible] by that time. But, basically, I said a little more that. I said—

E: No, you were actually pretty good when you read the strict words.

P: I understood, I understood what it was and I approved—uh, I was aware of the case—

E: Yeah.

P: —which I was. Harlow had raised it with me I think.

E: That's correct. That is, way back—

P: Early part of [unintelligible]—

E: So did Clar—, so did Mollenhoff, interestingly enough, uh, this guy, had talked with both Mollenhoff and Harlow here. And I believe [that] at one time or another they both talked to you about it. But Harlow particularly talked to you about it. But you see [one fact]—

P: [unintelligible] canned.

E: —whether or not he should be, uh, well, he really wasn't fired, he was sort of transferred into a non-existent job.

P: So Harlow [unintelligible].

E: Oh yeah, yeah, definitely.

P: Well, that's what I thought.

E: He was a, he was a thorn in everybody's side, you see—

P: Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly].

E: That's the point; and cutting up his superiors.

P: That's right.

E: Yeah.

P: And not, and frankly, not taking orders.

E: Well, uh I, I got a, a memo here whi' which the facts of the, of the whole Fitzgerald thing—[unintelligible]

P: Might as well put it out, just put out the procedure and so forth and so on. And, uh—

E: On the other thing—

P: The uh, uh, the uh, the uh, with your executive privilege one, just let, uh, if you want, just let, uh—

E: I would rather have Ron just give it to Clark and, uh, let him run with it.

P: Right.

E: Turn him on—[unintelligible]

P: [unintelligible] turn on, but at least it'll help a little, you know.

E: It [sure would/should].

P: Here's the reason I'd give it to Clark. We know that he's been bitching about a lot of things, and so forth

and so on. And they think that around here simply because somebody bitches that it [unintelligible] I don't want people to get the impression somebody has to be a hundred percent, John.

E: [unintelligible]

P: Nobody, nobody around here, nobody on our side that would be a hundred percent, except [unintelligible] and, uh, and we [unintelligible] what we [unintelligible].

E: Uh huh.

P: And nothing we can expect never comes to this kind of administration.

E: I getcha.

P: On the other hand, therefore, that they're, that they're on and off, uh, uh, Ziegler was pissed off at him and I wanna do some [unintelligible]. However, [unintelligible] and I say he doesn't have to be a hundred percent. The, uh—at least Mollenhoff doesn't have a double standard. As I said.

Tape: 43-A
Meter Reading: 602

TRANSCRIPT OF PART OF TELEPHONE CONVERSATION BETWEEN RICHARD NIXON AND RON ZIEGLER

6:51 P.M. February 1, 1973
EXECUTIVE OFFICE BUILDING

President: Did you get that, uh, did you handle that problem with your uh, uh, the uh, what's that Kilpatrick?

Ziegler: Uh, Fi—Fitzgerald.

P: Yeah.

Z: No problem at all. I just went out and uh—

P: Yeah. I wouldn't let, let 'em make a big thing.

Z: No, they didn't. As a matter of fact—

P: It isn't really. It's just a question of uh—

Z: Said that you had been reviewing the transcript last night—

P: Yeah.

Z: after the dinner—

P: Yeah.

Z: when you—

P: Yeah.

Z: were working on your remarks—

P: Yeah.

Z: and so forth and you want [unintelligible] talk about it this morning and uh, and uh, after the Heath thing we discussed it and you wanted me to simply say that you were, that it had never been put before you, that uh, that uh, uh you had misspoken on that, mis-

understood the thrust of the question and wanted me to tell 'em that.

P: Uh huh.

Z: And there was no, no problem at all.

P: Uh huh. We uh—by the uh—yeah.

Z: The executive privilege part—

P: Yeah.

Z: Right.

P: Yeah, yeah.

Z: But it uh was not an issue.

P: [unintelligible] questions, as well it would be with Mollenhoff [unintelligible]

Z: Well, I've talked to Clark personally, and he's in good shape.

P: Uh huh.

Z: Matter of fact, he had called uh, uh, both Pat Buchanan and myself and said that he thought that you had, may had, uh—

P: Uh huh.

Z: Uh mis, misunderstood what he was asking—

P: No, I was—

Z: and suggested we—

P: That's right.

Z: we, uh, we handle it this way.

P: Uh huh.

Z: So he's in good shape, and we're going to give him the executive privilege, uh, statement tomorrow.

P: Good.

Z: And he's looking forward to that.

P: Good, Good. Good. Fine, fine.

PART OF A CONVERSATION BETWEEN
PRESIDENT NIXON AND RONALD L. ZIEGLER
IN THE PRESIDENT'S OFFICE IN THE
OLD EXECUTIVE OFFICE BUILDING
ON FEBRUARY 26, 1973,
BETWEEN 4:50 AND 5:15 P.M.

Ziegler: Clark Mollenhoff.

President: Oh, yeah? What's he want? [Unintelligible]?

Z: Well, he is pushing the case of, of, uh, Fitzgerald—

P: Yeah.

Z: —and, uh, I don't burden you with the details but he says that one of the generals who testified at the Civil Service Committee hearing indicates that his investigative record showed that Fitzgerald was cleared in May of 1969. Clark then goes on to point out in his letter to you that he gave me that when he was here serving as your special counsel—

P: Yeah.

Z: —that the Air Force came into his office and [unintelligible] here at the White House in December of 1965, '69, many months later and indicated that Fitzgerald was still under a question—

P: Yeah.

Z: —of conflict of interest and so forth.

P: Right, right.

Z: The point of his letter is that—

P: He wants—

Z: —he feels—

P: –[unintelligible].

Z. –something should be done.

P: Yup.

Z: He, he wants, feels that something should be done about the Fitzgerald case and if not, uh, he feels that he is compelled to testify before the Civil Service hearing.

P: Right, righ–. Well, but wait a minute, he's got, uh–

Z: See, which, which–

P: –executive–

Z: –would–

P: –privilege.

Z: –which would mean that he would be testifying before the Civil Service hearing on information that he obtained while he was working in the, for the President of the United States. He says–.

P: He didn't get it from me, though.

Z: No.

P: Did he?

Z: And he, Clark, I don't think understands executive privilege 'cause he points out in here that he, that, he said, "As I know, as you know, I disagree with the President the issue on executive privilege and would not avail myself, uh, of it, uh, under, under any circumstances. [Unintelligible]."

P: Oh, hell, let's let it go. What were the, uh, what is the situation on the case? I don't really have any, uh–

Z: Well, I don't want–.

P: –interest in it whatever.

Z: What I would like to do–

P: Yeah.

Z: –is because he has this letter and he said–

P: Right.

Z: –you know, I uh–

P: Yup.

Z: –told him that I–

P: Sure.

Z: –have seen the–

P: Sure, sure.

Z: –President. Is to have John Dean call Clark in–

P: Yeah. Right.

Z: –at your request–

P: Right.

Z: –and simply put the facts on the Fitzgerald case and see what–

P: Tell him the President wants him to–

Z: –to do.

P: –to get the facts and see what the situation is and, uh, we'll, uh, and if, bu-but it would be best if he not raise it in a, uh, [unintelligible].

Z: That's what I think.

P: [Unintelligible]. He should call him into [unintelligible].

Z: All Right, I will. I'll call Clark now.

P: Yeah. And say, "Look, that the President [unintelligible] about it and said, 'Look, that he had no particular recollection of the, of, uh, of the matter we [unintelligible] the other day. [Unintelligible] this guy he's

[unintelligible] what [unintelligible] we've got the Air Force guy [unintelligible].' "

Z: You see, this is a case of, that, that, uh—

P: Came before we—.

Z: —came before we came in—

P: Oh, yeah.

Z: —but when we came in it was all Harlow's ball game [unintelligible]. I had a call in to Bryce on it.

P: Bryce was all for canning him, wasn't he?

Z: No, I think Bryce may have been the other way. That's why I [unintelligible]—.

P: Oh.

Z: See, at one point in '69—

P: Oh.

Z: —there was some discussion about hiring Fitzgerald over here at OMB—

P: Oh.

Z: —because it was felt that he did get a bum rap over there.

P: Oh, see?

Z: But I—.

P: You see, the case I was thinking about, when you asked me, was the other case—

Z: Rule.

P: —the Rule case, that's right. I thought [unintelligible]—.

Z: Which we can't say, of course.

P: I can't go [unintelligible].

Z: And that's the one that, uh, that Admiral Kidd did such a great job in handling–

P: Yeah, yeah.

Z: –but Clark being such a zealot, as he is–.

P: No, well, he may be right.

Z: He might be right.

P: That's what I wanna tell him. The President has made, he says he may be right and says to get to the bottom of it. We'd like for him, "the President asks that you [unintelligible] talk to Dean and he says that the President has some recollection that Harlow has some information on it. Why don't you talk to Harlow and then to, uh, present the facts to me? And I'll see what we could do."

Z: All right.

P: "[Unintelligible] the President's taken a personal interest in it." I don't want him to write [unintelligible]–

Z: Oh, no.

P: –but he can later. Tell him that–

Z: On a private basis.

P: –that he's privileged to write it later, but I, uh, I said that I felt that I was [unintelligible] going to get [unintelligible] to the bottom of this case, tell him [unintelligible] did, we did [unintelligible]–

Z: Yeah.

P: –you know, uh–

Z: OK.

P: –uh, [unintelligible] and ask, tell him I'd be interested in his personal evaluation of, he thinks he's [unintelligible].

Z: Yup.

P: [Unintelligible].

Z: In spite [unintelligible].

P: All right. Fine. Tell him—.

Z: He sent you a call in [unintelligible]—

P: Yeah.

Z: —[unintelligible] tomorrow about a Kent Cook, retired Air Force weapons analysis who died of a heart attack in '54, and Clark said that [unintelligible] living on a very low salary in terms of this whole bureauc—. See, Clark had a—

P: Who was Kent [unintelligible]?

Z: —[unintelligible]—.

P: Did we do it?

Z: No, we didn't do it.

P: Jesus Christ.

Z: That this is one of these—.

P: Well, Clark [unintelligible]. You gotta remember that he, uh, also in fairness to, Ron, Clark, uh, you [unintelligible].

Z: Well, I [unintelligible].

P: [Unintelligible] Clark does, uh, also one of those fellows that, tries to, tried to defend that other, that, that State Department, you remember that guy that we put on, uh, [unintelligible] no, he had, I think he was with Willard Edwards on that case. You remember that case?

Z: I don't remember the name.

P: Well, the one that involved, uh, the, the fellow that they canned at the State Department, you know,

because he, uh, conducted security [unintelligible]. Remember we put him on the [unintelligible]?

Z: Oh, yeah, [unintelligible] Tucker.

P: [Unintelligible]. Put Tucker in.

Z: [Unintelligible].

P: Well, just say the President has said that this, this intrigues him. The case intrigues him and he thinks Clark's an honest reporter and he wants the facts and he's asked Dean to get the facts and also discuss executive privilege with him. Well, to get the facts. He'd also like for him to get, [unintelligible] he wants Harlow, and get Harlow [unintelligible] on it. Now, we're not, we're not, uh, we, uh, this is not [unintelligible] no skin off our backs. We just wanna know the facts, but he must not write it until we get the facts. Then I'll look at it. That it'll be per– [unintelligible]. When they get, Dean gets it properly presented, it will be presented to me and I'll make a judgment on it myself.

Z: All right.

P: Fair enough?

Z: That's good.

P: And he's, I thought, and I said, [unintelligible], "Well, the President's expected to take a personal interest in the [unintelligible], and he's decided to [unintelligible] on this himself. You can't write it yet. First talk to Dean. He also'd like you to talk to Harlow. Both Dean and Harlow we will ask for an opinion on it. And we'll [unintelligible] get, get the Air Force's, uh, judgment [unintelligible]. Get their side of it too, and, uh, uh–."

Z: The reason I raise this in this manner [unintelligible] –.

P: Well—.

Z: I just don't want him to hit you [unintelligible].

P: [Unintelligible]. Well, you say, "This is, this is very interesting, and uh—."

APPENDIX D

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1979

No. 80-1406

A. Ernest Fitzgerald

v.

Alexander P. Butterfield,
Appellant
H. Robert Haldeman, et al.
(Civil Action No. 74-0178)

No. 80-1047

A. Ernest Fitzgerald

v.

Alexander P. Butterfield, et al.
Richard Nixon,
Appellant
(Civil Action No. 78-0178)

No. 80-1408

A. Ernest Fitzgerald

v.

Alexander P. Butterfield, et al.
Bryce N. Harlow,
Appellant
(Civil Action No. 78-0178)

[Filed Apr 30 1980]

ORDER

It is ORDERED, *sua sponte,* that the above captioned cases are consolidated.

FOR THE COURT:

George A. Fisher,
Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1979

No. 80-1406

A. Ernest Fitzgerald
v.
Alexander P. Butterfield,
Appellant
H. Robert Haldeman, et al.
(Civil Action No. 74-0178)

No. 80-1047

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Richard Nixon,
Appellant
(Civil Action No. 78-0178)

No. 80-1408

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Bryce N. Harlow,
Appellant
(Civil Action No. 78-0178

[Filed Apr 30 1980]

BEFORE: Tamm, Mikva and Robb, Circuit Judges

ORDER

Upon consideration of appellee's motions (1) to dismiss for lack of jurisdiction, or, in the alternative, for summary affirmance and (2) for expedited consideration of his motion, of appellants' oppositions thereto, and of the District Court's request that this matter be expedited, it is

ORDERED by the Court that the motion to dismiss is granted.

Per Curiam

Circuit Judge Robb did not participate in the foregoing order.

Office-Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD M. NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

JOINT APPENDIX

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Petitions for Certiorari Filed May 14 and December 11, 1980
Certiorari Granted June 22, 1981

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CIVIL DOCKET

United States District Court for the District of Columbia

C. A. No. 178-74

ERNEST FITZGERALD

vs.

ROBERT C. SEAMANS, JR., *et al*

RECORD REFERENCE NUMBER	DATE	PROCEEDINGS
	1974	
1	Jan 25	Complaint, appearance Jury demand
2	Jan 25	Summons, Copies (9) and Copies (9) of Complaint issued;
3	Feb 15	MOTION by defts. #1, 2, 4, 5, 6, 7, and 9 for enlargement of time; P&A's; c/m Appearance of Robert S. Rankin, Jr.
4	Feb 20	SUMMONS, copy (1) and copy (1) of complaint issued to deft. #1:
5	Feb 20	SUMMONS, copy (1) and copy (1) of complaint issued to D.A.:
6	Feb 22	RESPONSE by pltf. to defts. motion for enlargement of time to answer; c/s 2-22-74.
7	Feb 27	MOTION by pltf. to take depositions by other than stenographic means; memorandum; c/s 2-27-74.
8	Feb 28	SUMMONS, copy (1) & copy (1) of Complaint issued to deft. #8: served.
9	Mar 8	SUPPLEMENTAL memorandum of points and authorities by defts in support of motion for enlargement of time; c/m 3-8-74.

Record Reference Number	Date	Proceedings
	1974	
10	Mar 8	OPPOSITION by defts. #1, 2, 4, 5, 6, 7, and 9 to pltfs. motion to take deposition by other than stenographic means; P&A's; exhibit A; c/m 3-8-74.
11	Mar 18	MOTION by defts. #3 and 8 for enlargement of time; P&A's c/m 3-18-74.
12	Mar 20	ORDER granting motion of defts. Melvin R. Laird and Durwood L. Crow, #3 and 8, for enlargement of time; extending time through 4-22-74 within which said defts. may respond to the complaint. (N) Gesell, J.
13	Mar 26	NOTICE by pltf. to take depositions of Carl S. Wallace, Michael Ross, John Badin, Jr., Eugene L. Kirschbaum, David Wilson, Alexander P. Butterfield; Ronald Zeigler; appendix; c/m 3-26-74.
14	Mar 26	ORDER granting motion by defts. #1, 2, 4, 5, 6, 7 and 9 for enlargement of time and extending time through 4-22-74 within which they may respond to the complaint. (N) Gesell, J.
15	Apr 1	MOTION by defts. for protection order; P&A's; c/s 4-5-74.
16	Apr 5	OPPOSITION by pltf. to defts. motion for protective order; c/s 4-5-74.
17	Apr 9	ORDER granting motion of defts. for protective order to the extent that discovery is stayed until defts. have answered the complaint or have moved for dismissal or summary judgment; vacating pltfs. notice to take depositions. (N) Gesell, J.
18	Apr 10	ORDER denying motion of pltf. to take depositions by other than stenographic means. (N) Gesell, J.
19	Apr 22	MOTION by defts. for enlargement of time; P&A's; c/m 4-22-74.

Record Reference Number	Date	Proceedings
	1974	
20	Apr 29	MOTION by defts. #1, 2, 3, 4, 5, 6, 7, 8, and 9 to dismiss, or in the alternative, for summary judgment; exhibit 1, 2, 3, 4, attachment A, B, exhibit 5, 6, attachment A, B, C; exhibit 7, attachment A, B, C; exhibit 8, attachment A, B, C, D, exhibit 9, exhibit 10, exhibit 11, 12, 13, 14, attachment 1, 2, 3, 4, 5, 6, 7, 8; exhibits 15 & 16, statement; P&A's; attachment; 4-29-74.
21	*Apr 24	ORDER granting motion of defts. for enlargement of time through 4-29-74 within which to answer the complaint. (N) Gesell, J.
22	May 6	NOTICE by pltf. to take deposition of deft. #4, Eugene L. Kirschbaum, and Carl S. Wallace; c/m 5-6-74.
23	May 6	FIRST request by pltf. for production of documents to deft. #4; c/m 5-6.
24	May 6	MOTION by pltf. for enlargement of time within which to respond to defts. motion to dismiss or, in the alternative, for summary judgment; P&A's; c/m 5-6-74.
25	May 7	ATTACHMENT (2) to motion by pltf. for enlargement of time.
26	May 7	ORDER granting pltf. through 7-8-74 within which to respond to motion by deft. to dismiss, or in the alternative, for summary judgment. No further extensions will be allowed. (N) Gesell, J.
27	May 10	MOTION by defts. for protective order; P&A's; c/s 5-10-74.
28	May 20	MEMORANDUM of points and authorities by pltf. in opposition to defts. motion for protective order; affidavit of A. Ernest Fitzgerald; c/s 5-19-74.
29	May 22	SUPPLEMENTAL points and authorities by defts. in support of motion for protective order; c/m 5-22-74.

Record Reference Number	Date	Proceedings
	1974	
30	Jun 4	ORDER denying motion of defts. for a protective order. (N) Gesell, J.
31	Jun 10	AFFIDAVIT of service by John Bodner, Jr. on Captain Bruce E. Clark on 6-6-74; attachment.
32	Jun 13	STIPULATION extending time through 6-14-74 within which defts. may respond to pltfs. subpoena, APPROVED. (N) Gesell, J.
33	Jun 18	STIPULATION extending time through June 20, 1974 within which deft. may respond to subpoena dated 6-6-74, APPROVED. (FIAT) (N) Gesell, J.
34	Jul 8	MOTION by pltf. for extension of time; P&A's; c/s 7-8-74.
35	Jul 9	ORDER granting motion of pltf. for an extension of time through 7-19-74 within which to respond to motion for summary judgment. (N) Gesell, J.
36	Jul 16	CERTIFICATE of mailing by pltf.; attachments (2); c/s 7-16-74.
37	Jul 19	DEPOSITION of Carl S. Wallace for pltf.; exhibit 1; exhibit 2; exhibit; exhibit 5; exhibit 6; exhibit 7; exhibit 8.
38	Jul 22	DEPOSITION of Eugene L. Kirchbaum taken on June 6, 1974 for the pltf.; Exhibits 1 through 6; attached.
39	Jul 22	MEMORANDUM of pltf. in opposition to defts' motion to dismiss or, in the alternative, for summary judgment; Statement of Genuine Issues; Affidavit of pltf. in support of opposition; Attachments A thru H; Affidavit of John Bodner, Jr. with attachment; Affidavits (3); c/s 7-22-74.
40	Jul 22	ORDER granting motion of pltf. extending time through 7-22-74 within which pltf. may respond to motion of defts. to dismiss or in the alternative for summary judgment. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1974	
41	Aug. 9	DEPOSITION of Alexander P. Butterfield taken on June 15, 1974 for the pltf; attachment.
42	Aug. 9	DEPOSITION of Alexander P. Butterfield taken on June 12, 1974 for the pltf; attachment.
43	Aug 23	SUPPLEMENTAL points and authorities of deft. in support of motion to dismiss or, in the alternative, for summary judgment; c/m 8-23-74.
44	Sep 16	SUPPLEMENTAL affidavit by pltf. in support of opposition to defts. motion to dismiss, or in the alternative, for summary judgment; affidavit of A. Ernest Fitzgerald; c/s 9-16.
45	*Sep 13	MOTION of deft. to dismiss or in the alternative for summary judgment on the statute of limitations issue only, heard and taken under advisement. (Rep: I. Watson) Gesell, J.
46	Sep 20	RESPONSE by defts. to the supplemental affidavit of A. Ernest Fitzgerald; c/s 9-20-74.
47	Sept 24	SUPPLEMENTAL submission by pltf. in opposition to defts. motion to dismiss, or in the alternative, for summary judgment; c/s 9-24-74.
48	Oct 3	SUPPLEMENTAL submission by plaintiff in opposition to defendants' motion to dismiss or in the alternative for summary judgment, c/ser 10/3.
49	Oct 9	REPLY by defts. to pltfs. supplemental submission in opposition to defts. motion to dismiss or in the alternative for summary judgment; c/s 10-9-74.
50	Oct 9	MEMORANDUM AND ORDER granting motion of defts. for summary judgment. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1974	
51	Dec 6	NOTICE of appeal by pltf. from Memorandum and Order of October 9, 1974. Deposit $5.00 by John Bodner and credited to U.S. Treasury. Copy mailed to U.S. Attorney and John M. Kelson.
	1975	
52	Jan 9	TRANSCRIPT of proceedings of 9-13-74, pages 1-52. (Rep: I. Watson); Court copy.
53	Jan 16	RECORD on appeal delivered to USCA on 1-15-75; receipt acknowledged. (75-1032)
	1977	
54	May 13	CERTIFIED copy of JUDGMENT USCA affirming judgment of the USDC as to all appellees except Butterfield, the summary judgment that the action against appellee Butterfield is time-barred is reversed, and the case, insofar as it pertains to appellee Butterfield is remanded for further proceedings. OPINION attached.
55	May 18	ANSWER of deft. #4 to complaint; c/m 5-18-77. Appearance of Rebecca Ross.
56	June 20	ORDER filed 6-16-77 directing pltf. to file an amended complaint by 6-25-77; directing Dept. of Justice upon receipt of said amended complaint to begin to solve the representational problems of the named defts.; pltfs. document discovery will begin immediately upon the filing of the amended complaint and setting hearing on motion of defts. pending preliminary motions and objections to discovery for 7-27-77 at 9:30 a.m. (N) Gesell, J.
57	Jun 27	AMENDED complaint by pltf. changing caption; trial by jury requested; exhibit A; c/s 6-27-77.

Record Reference Number	Date	Proceedings
	1977	
58	Jun 27	SUMMONS and copy of amended complaint issued to deft. Haldeman:
59	June 29	FIRST request by pltf. for production of documents to deft. #2; c/m 6-29-77.
60	June 29	NOTICE by pltf. to take deposition of the person or persons in the U.S. Dept. of Defense who are familiar with the books and records called for by the attached specifications; schedule A; c/m 6-29-77.
61	June 29	NOTICE by pltf. to take deposition of the person or persons in the White House who are familiar with the books and records called for by the attached specifications; schedule A; exhibit A; c/m 6-29-77.
62	June 29	NOTICE by pltf. to take deposition of the person or persons in the U.S. Dept. of the Air Force who are familiar with the books and records called for by the attached specifications; schedule A; c/m 6-29-77.
63	June 29	FIRST request by pltf. for production of documents to deft. #3; c/m 6-29-77.
64	June 29	FIRST request by pltf. for production of documents to deft. #1; c/m 6-29-77.
65	July 12	NOTICE by pltf. to take deposition of person or persons in the GSA who are familiar with books and records called for by the attached specifications; Schedule A; exhibit A; c/m.
66	July 15	PARTIAL response by defts. to subpoenas duces tecum; c/s 7-14-77.
67	July 15	OBJECTIONS by defts. to subpoenas duces tecum; c/s 7-14-77.
68	Jul 25	REPLY of pltfs. to the Government's objections to subpoenas Duces Tecum and Partial response to subpoenas duces Tecum; Exhibits A thru E; c/m 7-25-77.

Record Reference Number	Date	Proceedings
	1977	
69	July 27	RESPONSE by deft. #2 to pltfs. first request for production of documents; c/m 7-26-77.
70	July 27	RESPONSE by deft. #1 to pltfs. first request for production of documents; c/m 7-26-77.
71	July 27	RESPONSE by deft. #3 to pltfs. first request for production of documents; c/m 7-26-77.
72	July 27	STATUS CALL. Further status call and hearing on motions set for 9-14-77 at 9:30 a.m. Government to file motions by 8-1-77. (Rep: I. Watson) Gesell, J.
73	July 27	LETTER dated 7-26-77 from government counsel filed.
74	Aug 2	MOTION by deft. #3 to dismiss amended complaint or in the alternative for summary judgment; motion by deft. #2 to dismiss amended complaint; post-remand P&A's in support of motions; attachment; c/m 8-1-77.
75	Aug 12	MOTION of pltff. for extension of time to respond to Gov'ts motions to dismiss amended complaint; c/m 8-12-77.
76	Aug 16	RESPONSE by defts. to pltfs. motion for extension of time; c/m 8-16-77.
77	Aug 17	ORDER extending time to 9-9-77 for pltf. to respond to motions to dismiss amended complaint. (N) Corcoran, J.
78	Aug 18	DEPOSITION of Steven Garfinkel for pltf. taken on July 15, 1977.
79	Aug 22	DEPOSITION of Edward Stafford Bridges II for pltf. taken on July 15, 1977.
80	Aug 22	DEPOSITION of Mrs. Marie Bouknight Allen for pltff. taken on 7-15-77.
81	Aug 29	DEPOSITION of Tom Graham Morgan for pltf. taken on July 15, 1977.

Record Reference Number	Date	Proceedings
	1977	
82	Aug 29	DEPOSITION of Martin Abraham Miller for pltf. taken on July 15, 1977.
83	Aug 31	DEPOSITION of William Eugene Roberts for pltf. taken on July 15, 1977.
84	Sept 2	AFFIDAVIT of Durward L. Crow; exhibit 1, affidavit of H.R. Haldeman; c/s 9-2-77.
85	Sept 9	MEMORANDUM by pltfs in opposition to defts motion to dismiss, or, in the alternative, for summary judgment; statement of material facts; c/s 9-9-77.
86	Sept 14	MOTION of defts. to dismiss or in the alternative for summary judgment heard and denied without prejudice. (Rep: I. Watson) Gesell, J.
87	Sept 14	APPEARANCE of Kenneth E. Krosin and John F. Bruce as counsel for plft.
88	Sept 27	TRANSCRIPT of proceedings of 9-14-77, pages 1-47. (Rep: I. Watson); Court copy.
89	Sept 28	SUPPLEMENTAL response by pltf. to defts. motion to dismiss or in the alternative for summary judgment; affidavit of A. Ernest Fitzgerald; attachments A-N; c/m 9-28-77.
90	Sept 30	PARTIAL Reply by defts. to response of pltf. to motion of deft. to dismiss or in the alternative for summary judgment; affidavit of Charlotte Anne Reid; Attachments 1 thru 3; c/m 9-30-77.
91	Oct 7	TRANSCRIPT of proceedings of July 27, 1977, pages 1-28. (Rep: I. Watson); Court copy.
92	Oct 11	SUPPLEMENTAL reply of defts. to pltfs. supplemental response to defts. motion to dismiss, or in the alternative, for summary judgment; affidavit of Duward L. Crow; affidavit of William Woodruff; attachment W-1; c/m 10-11-77.

Record Reference Number	Date	Proceedings
	1977	
93	Oct 14	ORDER filed on 10-13-77 granting motion of deft. Duward L. Crow for summary judgment. (N) Gessell, J.
94	Nov 9	MOTION of pltf. for recusal of trial judge; memorandum of P&A's; affidavit of bias of A. Ernest Fitzgerald; affidavit of John Bodner, Jr.; attachment; certificate of counsel; c/m 11-9-77.
95	Nov 10	MOTION of pltf. for reconsideration of order of 10-13-77; memorandum of P&A's; affidavit of A. Ernest Fitzgerald; attachments A-Q; c/m 11-10-77.
96	Nov 15	OPPOSITION of defts. to pltfs. motion for recusal of trial judge; affidavit of Rebecca L. Ross; affidavit of Alexis Panagakos; attachment memorandum; c/m 11-15-77.
97	Nov 25	OPPOSITION of defts. to pltfs. motion for reconsideration; memorandum; c/m 11-25-77.
98	Nov 29	NOTICE of plft. to take deposition of person or persons in the CSC who are familiar with the books and records called for by the attached specifications; attachment; c/m 11-29-77.
99	Nov 29	REPLY of pltf. to defts. opposition to motion for recusal of trial judgment c/s 11-29-77.
100	Dec 2	NOTICE of defts. of substitution of corrected filings to memo in opposition to pltfs. motion for reconsideration filed on 11-25-77; affidavit of Alexis Panagakos; c/s 12-2-77.
101	Dec 6	ORDER filed 12-2-77 denying motion of pltf. for reconsideration of order of 10-13-77. (N) Gesell, J.
102	Dec 6	ORDER filed on 12-2-77 denying motion of pltf. to recuse trial judge. (N) Gessell, J.

Record Reference Number	Date	Proceedings
	1977	
103	Dec 14	NOTICE of pltf. to take deposition of the person or persons in the Civil Service Commission who are familiar with the books and records called for by the attached specifications; Schedule A; attachment; c/m 12-14-77.
104	Dec 14	STATUS REPORT on pltfs. discovery; attachments A-D; exhibits A-C; attachments E and F; c/m 12-14-77.
105	Dec 21	WITHDRAWAL of appearance of Rebecca L. Ross as counsel for defts.; c/m 12-21-77. CD/N
106	Dec 30	STIPULATION approved whereby the parties and the CSC agree that the notice of deposition and subpena duces tecum served on the CSC returnable 12-23-77 is stayed and returnable instead on 12-30-77. (N) (FIAT) Gesell, J.
	1978	
107	Jan 11	DEPOSITION of Llewellyn M. Fischer taken on 12-16-77 for pltf.
108	Feb 8	APPEARANCE of E. Barrett Prettyman, Jr., Curtis E. Von Kann, Peter Raven-Hansen, Sharon M. Williams and the firm of Hogan & Hartson as counsel for pltf.; c/m 2-8-78.
109	Feb 16	WITHDRAWAL of William L. Sollee as counsel for pltf.; c/m 2-16-78.
110	Feb 16	WITHDRAWAL of John Bodner, Jr. as counsel for pltf.; c/m 2-16-78. CD/N
111	Mar 8	APPEARANCE of Jonathan B. Smith as counsel for defts.; appearance of Alexis Panagakos as counsel for defts.; appearance of Mark S. Landman as counsel for defts.; c/s 3-8-78.

Record Reference Number	Date	Proceedings
	1978	
112	Mar 15	STATUS CALL. Motion of pltf. for production of documents to be filed by 4-19-78; defts. to respond by 4-19-78. Hearing on motions set for 5-5-78 at 9:30 a.m. Further status call set for 4-3-78 at 9:30 a.m. (Rep: I. Watson) Gesell, J.
113	Mar 27	STIPULATION AND ORDER filed on 3-22-78 re handling of Air Force Oral History Project transcript. (N) Gesell, J.
114	Mar 30	MEMORANDUM by pltff. concerning pltff's subpoena duces tecum for certain White House Tape Recordings; c/s 3-30-78.
115	Apr 3	SUPPLEMENTAL memorandum of pltf. concerning subpoena duces tecum for certain White House tape recordings; c/s 3-31-78.
116	Apr 3	STATUS CALL. Discovery re two (2) tapes to go forward. (Rep: I. Watson) Gesell, J.
117	Apr 5	MOTION of pltf. for *in camera* inspection of documents; memorandum.
118	Apr 5	MOTION of pltf. to compel production of documents pursuant to pltfs. subpoenas duces tecum; memo of P&A's.
119	Apr 11	MOTION of Richard Nixon for leave to file memorandum as amicus curiae; memorandum; exhibit.
120	Apr 14	TRANSCRIPT of proceedings of 3-15-78, pages 1-44. (Rep: I. Watson) Court copy.
121	Apr 14	TRANSCRIPT of proceedings of April 3, 1978, pages 1-15. (Rep: I. Watson); Court copy.
122	Apr 19	FIRST interrogatories of defts. to pltf.; first request for production of documents.
123	Apr 19	RESPONSE of defts. to pltfs. motion for in camera inspection of documents.

Record Reference Number	Date	Proceedings
	1978	
124	Apr 25	OPPOSITION of defts. to pltfs. motion to compel production of documents; exhibit 1.
125	Apr 28	MOTION of pltf. for protective order; memo of P&A's.
126	May 1	RESPONSE of pltf. to defts. opposition to pltfs. motion to compel production of documents.
127	May 3	OPPOSITION of defts. to motion of pltf. for protective order.
128	May 10	NOTICE by defts. of *in camera* submission.
129	May 10	NOTICE by defts. of submission of transcripts.
130	May 5	MOTION of pltf. for production of documents argued, granted in part and denied in part. Motion of pltf. for a protective order heard and granted. Hearing for production of (further) White House documents set for 5-26-78 at 9:45 a.m. (Rep: I. Watson) Gesell, J.
131	May 15	ORDER filed on 5-9-78 granting motion for pltf. for *in camera* inspection of certain documents in possession of GSA; directing that the Archivist of the U.S. deliver copies of said documents to the court for inspection. (N) Gesell, J.
132	May 15	ORDER filed on 5-9-78 granting in part and denying in part motion of pltf. to compel production of 69 documents; certain documents to be supplied to pltf. by 5-10-78 at 10:00 a.m. (Signed 5-5-78)(N) Gesell, J.
133	May 23	TRANSCRIPT of proceedings of May 5, 1978, pages 1-85. (Rep: I. Watson); Court copy.

Record Reference Number	Date	Proceedings
	1978	
134	May 25	ORDER filed on 5-24-78 granting motion of pltf. for a protective order; directing that defts. first interrogatories be stricken without prejudice. (N) Gesell, J.
135	May 25	ORDER filed on 5-24-78 granting motion of Richard Nixon for leave to file memorandum as amicus curiae. (N) Gesell, J.
136	May 26	MOTION of pltf. for product ion of documents heard and taken under advisement. (Rep: I. Watson) Gesell, J.
137	June 9	ORDER filed 6-7-78 denying without prejudice pltfs. motion for in camera inspection and production of documents. (N) Gesell, J.
138	June 19	ORDER filed 6-16-78 directing that certain transcripts of White House tape recorded conversations be delivered to pltf. FORTHWITH; setting forth certain directives as to said transcripts; pltf. to file motion for leave to amend the complaint within 14 days from receipt of the transcripts. (N) Gesell, J.
139	June 29	TRANSCRIPT of proceedings of May 26, 1978, pages 1-47. (Rep: I. Watson); Court copy.
140	July 5	MOTION of pltf. for leave to file amended complaint adding Richard M. Nixon, Bryce N. Harlow and David Packard as party defts.; memo of P&A's; exhibit; verification; affidavit of A. Ernest Fitzgerald; exhibits A-Q.
141	July 5	SUPPLEMENTAL memorandum of P&A's in support of pltfs. motion for leave to amend his complaint. (Sealed pursuant to Court's order of 6-16-78 and taken to Courtroom Division.)
142	July 17	STIPULATION extending time through 7-21-78 within which defts. may respond to motion for leave to file amended complaint, SO ORDERED. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1978	
143	July 19	AFFIDAVIT of James B. Rhoads with attachments filed.
144	July 19	COPIES of Nixon Presidential Historical Materials filed and se-led in large brown envelope) by direction of Court. (Placed in locked file cabinet.)
145	July 19	TRANSCRIPT of tape recordings within the Nixon Presidential Historical materials filed and sealed by direction of the Court. (Placed in large brown envelope and placed in locked file cabinet.)
146	July 21	MEMORANDUM of P&A's of defts. in opposition to pltfs. motion for leave to amend his first amended complaint; exhibits 1-20.
147	July 21	SUPPLEMENTAL memorandum of P&A's of defts. in opposition to plfs. motion for leave to amend his complaint. (Sealed and taken to Courtroom Division.)
148	Aug 11	REPLY of pltf. to defts. opposition to pltfs. motion for leave to amend his first amended complaint; Appendix; affidavit of Clark R. Mollenhoff; list of exhibits; exhibits S, T, U, V, W, X, and Y. (Sealed and taken to Courtroom Division.)
149	Sept 8	MOTION of pltff. for leave to file amended complaint heard and granted in part and denied in part. Granting pltff. permission to add Nixon and Harlow as party defts. & denying motion as to adding Parkard as a deft. (Rep. Watson) Gesell, J.
150	Sept 14	ORDER denying pltfs. motion for leave to file amended complaint as to proposed deft. David Packard and other persons whose identities are at this time unknown to pltf.; no additional amendment to add parties will be granted; further ordered that pltfs. motion for

Record Reference Number	Date	Proceedings
	1978	
		leave to file amended complaint is granted as to proposed defts. Richard M. Nixon and Bryce N. Harlow; and further ordered that the amended complaint as resubmitted in conformity with this order be deemed filed as of this date (N) Gesell, J.
151	Sept 14	AMENDED complaint adding Richard M. Nixon and Bryce N. Harlow as party defts.
152	Sept 19	SUMMONS (2) and copies (2) of amended complaint issued to defts. #3 and 4: #4 NF 10-11-78; #3 ser 10-27-78
153	Sept 20	FIRST interrogatories of defts. to pltf.
154	Sept 25	TRANSCRIPT of proceedings of 9-8-78, pages 1-48. (Rep: I. Watson); Court copy.
155	Sept 26	STIPULATION approved 9-25-78 extending time through 10-23-78 within which defts. Butterfield and Haldeman may respond to the second amended complaint, SO ORDERED. (N) Gesell, J.
156	Oct 12	SUMMONS and copy of second amended complaint issued to Dennis Dutterer, U.S. Atty: serv. 10-13-78.
157	Oct 16	STIPULATION approved extending time through 11-21-78 within which defts. Nixon and Harlow may respond to the second amended complaint. (N) Gesell, J.
158	Oct 16	STIPULATION approved extending time through 11-3-78 within which pltf. may answer first interrogatories. (N) Gessel, J.
159	Oct 23	RENEWED motion of defts. #1 and 2 to dismiss or, in the alternative, for summary judgement; memo of P&A's; exhibits 1-3.

Record Reference Number	Date	Proceedings
	1978	
160	Oct 26	STIPULATION approved extending time through 11-17-78 within which pltf. may reply to the renewed motion to dismiss or in the alternative for summary judgment. (N) Gesell, J.
161	Nov 3	ANSWERS of pltf. to defts' first Interrogatories; Appendix
162	Nov 17	MOTION of pltf. for leave to file brief in excess of page limitations of local Rule 1-9(e); P&A; Exhibit-(Opposition to renewed motion of defts. Butterfield & Haldeman to dismiss or in the alternative for Summary Judgment; Statement & attachment) (EXHIBIT UNDER SEAL)
163	Nov. 21	MOTION of defts. #3 & 4 to dismiss or, in the alternative, for summary judgment; P & A; Table of Cases; Statement; Affidavit of Richard Nixon & Bryce N. Harlow as attachment 1 & 2; Attachments 3, 4, 5, 6,
164	Nov. 22	MOTION of pltf. for leave to file brief in excess of page limitations of Local Rule 1-9(e). (Fiat) Gesell, J.
165	Nov. 22	OPPOSITION of pltf. to renewed motion of defts. Butterfield and Haldeman to dismiss or in the alternative, for summary judgement; Table of Contents; Table of Authorities; Exhibit Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ.; Statement.
166	Nov. 29	STIPULATION approved 11-28-78 extending time through 12-15-78 within which pltf. may reply to the motion to dismiss or in the alternative for summary judgment filed by defts. Nixon & Harlow & extending time through 12-29-78 within which all defts. may reply to pltf.'s opposition to motions to dismiss or in the alternative for summary judgment. So Ordered. (N) GESELL, J.

Record Reference Number	Date	Proceedings
	1978	
167	Dec. 15	OPPOSITION of pltfs. to motion to dismiss or, in the alternative, for summary judgment by defts. Nixon & Harlow; Table of Contents; Table of Authorities; Attachment; Supplemental statement
168	Dec. 20	STIPULATION approved extending time through 1-8-79 within which defts. may file opposition to motions to dismiss. (N) GESELL, J.
169	Dec. 27	REQUEST (first) of pltf. for production of documents to deft. Nixon.
170	Dec. 27	REQUEST (first) of pltf. for production of documents to deft. Harlow.
	1979	
171	**Jan. 8	MOTION of defts. for leave to file brief in excess of Page limitations of Local Rule 1-9(e); P & A; Exhibit.
172	Jan 10	ORDER granting motion of defts. to file reply to pltfs. opposition to renewed motion of defts. Butterfield and Haldeman to dismiss or, in the alternative for summary judgment and to pltfs. opposition to motion of defts. Nixon and Harlow to dismiss, or in the alternative for summary judgment. (N) Gesell, J.
173	Mar 2	NOTICE of defts. of submission of transcripts; affidavit of James B. Rhoads; attachment. (Sealed and taken to Marge Whitacre, Courtroom Division.)
174	Mar 5	NOTICE of defts, of submission of post-argument memorandum linking elements of pltf.-appellant Fitzgerald's tort theories to knowledge acquired within period of the statute of limitations; attachment.
175	Mar 5	MOTIONS argued and taken under advisement. (Rep: J. Moore) Gesell, J.
176	Mar 7	CONSENT ORDER filed 3-5-79 removing seal from certain tape transcripts and memoranda filed on July 5 and July 21,

Record Reference Number	Date	Proceedings
	1979	
		1978 and on March 2, 1979; vacating Court's order of 6-16-78 placing certain documents under seal. (N) Gesell, J.
177	Mar 9	REPLY of Defts. to pltfs. March 6, 1979 letter regarding the applicability of the doctrine of fraudulent concealment to deft. #1.
178	Mar 19	MOTION of deft. #3 for enlargement of time to file a memorandum; supplemental memorandum. Appearance of Jeffrey Axelrad and Larry Gregg.
179	Mar 20	RESPONSE of pltf. to deft. Nixon's motion for enlargement of time.
180	Mar 26	ORDER granting motion of defts. for an extension of time; extending time through 3-27-79 within which to file a memorandum on the effect of the pardon of former President Nixon on this suit; pltf. to reply by 4-3-79. (N) Gesell, J.
181	Mar 26	SUPPLEMENTAL memorandum of pltf. in opposition to defts. motions to dismiss or, in the alternative, for summary judgment; table of contents table of authorities; attachments 1 and 2.
182	Mar 27	SUPPLEMENTAL memorandum of defts. regarding the effect of pardon, as requested by the Court, March 5, 1979.
183	Mar 30	SUPPLEMENTAL memorandum of pltf. regarding the affirmative defense of Presidential pardon.
184	Apr 2	MOTION of defts. for enlargement of time in which to file a reply to pltfs. supplemental memorandum.
185	Apr 5	ORDER filed 4-4-79 granting motion of defts. for an enlargement of time within which to reply to pltfs. supplemental memorandum in opposition to defts. motions to dismiss or in the alternative for summary judgment; extending time through 4-17-79. (N) (Signed 4-3-79) Gesell, J.

Record Reference Number	Date	Proceedings
	1979	
186	Apr 6	REPLY of defts. to pltfs. supplemental memorandum regarding the affirmative defense of the presidential pardon.
187	Apr 11	ORDER filed 4-9-79 striking supplemental memorandum of defts. regarding the effect of the pardon filed 3-27-79; directing that former President Nixon has waived his defense(s) in this action based upon his pardon unless he asserts in writing within 10 days that the pay absolves him from liability for damages as alleged. (N) Gesell, J.
188	Apr 17	REPLY of defts. to pltfs. supplemental memorandum in opposition to deft motion to dismiss, or in the alternative, for summary judgment.
189	Apr 19	RESPONSE of pltf. to defts. reply to pltfs. supplemental memorandum in opposition to defts. motion to dismiss or, in the alternative, for summary judgment.
190	Apr 27	LETTER dated 3-6-79 with attachment to Court from Peter Raven-Hensen.
191	May 2	ORDER filed 4-27-79 denying in part and granting in part motions of defts. to dismiss or, in the alternative, for summary judgment; dismissing pltfs. claim under the 9th Amendment, his claim for unconstitutional and common law invasion of privacy, and his claims under 42 USC 1985(3) and 1986; withholding ruling as to whether pltf. stakes a cause of action under the fifth amendment. (N)Gesell, J.
192	May 9	TRANSCRIPT of proceedings of 3-5-79; Pages 1 through 94; (Rep: J. Moore); court copy.
193	May 11	STIPULATION whereby counsel agree that defts. Butterfield, Nixon and Harlow shall have through 5-22-79 within which to respond to the second amended complaint, SO ORDERED. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1979	
194	May 15	MOTION by pltf. to take deposition by other than stenographic means; P&A
195	May 18	FIRST set of interrogatories to deft. #3 by pltf.
196	May 18	FIRST set of interrogatories by pltf. to deft. #4.
197	May 18	FIRST set of interrogatories by pltf. to deft. #1.
198	May 21	NOTICE of pltf. to take deposition of Harold Brown; attachments (2).
199	May 21	NOTICE of pltf. to take deposition of William Evan Timmons; attachments (3).
200	May 22	MOTION of defts. #1, 3, and 4 for enlargement of time to respond to the second amended complaint and for a stay of all proceedings; memo of P&A's.
201	May 22	MOTION of defts. #1, 3, and 4 for a stay of all proceedings pending this Court's determination on defts. motion for an enlargement of time to respond to the second amended complaint and for a stay of all proceedings.
202	May 23	OPPOSITION of defts. to pltfs. motion to take depositions by other than stenographic means.
203	May 24	WITHDRAWAL of appearance of Jeffrey Axelrad as counsel for deft. #3. CD/N. withdrawal of appearance of Mark A. Landman as atty. for same deft. and withdraw appearance of Jonathan B. Smith as counsel for all defts. (no longer with the Dept. of Justice).
204	May 24	SUPPLEMENTAL memorandum of defts. in support of opposition to pltfs. motion to take depositions by other than stenographic means.

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	1979	
205	May 24	STATUS CALL. Motion of defts. for extension and stay to answer amended complaint denied. Pltfs. application to take depositions by other than stenographic means, denied. All Counsel to complete depositions by 9-1-79. (Rep: I. Watson) Gesell, J.
206	May 29	REPLY of pltf. to defts. opposition to pltfs. motion to take depositions by other than stenographic means; attachments A and B; affidavit of A. Ernest Fitzgerald.
207	May 30	ANSWER of deft. Nixon to second amended complaint. Appearance of Herbert J. Miller, R. Stan Mortenson, and Stephen L. Nightingale.
208	May 31	APPEARANCES of Herbert J. Miller, Jr., R. Stan Mortenson, & Stephen L. Nightingale as counsel for deft. Nixon, CD/N
209	June 1	ANSWER of deft. #1 to second amended complaint. Appearance of Jeffrey Axelrad and Mark S. Landman.
210	June 1	ANSWER of deft. #2 to second amended complaint.
211	June 4	NOTICE of deft. #3 to take deposition of pltf.
212	June 4	REQUEST of deft. #3 for production of documents by pltf.
213	June 4	FIRST set of interrogatories by deft. #3.
214	June 4	STIPULATION for defts. Butterfield and Harlow extending time through 6-1-79 within which defts. may respond to second amended complaint, approved. (N) Gesell, J.
215	June 5	STATUS CALL. Deposition of William Timmons to be taken by tape recorder as scheduled. Deposition of defts. to be taken by regular stenographic methods. (Rep: I. Watson) Gesell, J.
216	June 18	ANSWERS of deft. #4 to pltfs. first set of interrogatories.

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	1979	
217	June 18	ANSWERS of deft. #1 to pltfs. first set of interrogatories.
218	June 20	NOTICE of pltf. to take deposition of David G. Wilson; attachments (2).
219	June 26	NOTICE of pltf. to take deposition of Jack L. Stempler; attachment.
220	June 26	NOTICE of pltf. to take deposition of Melvin R. Laird; attachment.
221	June 26	NOTICE of pltf. to take deposition of Dr. Henry A. Kissinger; attachment.
222	June 26	NOTICE of pltf. to take deposition of Robert C. Seamans, Jr.; attachment.
223	June 27	REVISED notice of pltf. to take deposition of Jack L. Stempler; attachment.
224	June 28	ANSWERS of deft. #3 to pltfs. first set of interrogatories; exhibit A.
225	July 3	MOTION of deft. #2 for entry of an order of judgment; memo of P&A's.
226	July 3	NOTICE of deft. Nixon to take deposition of Frederick Graboske; attachments (2).
227	July 5	NOTICE of pltf. to take deposition of William W. Woodruff; attachment.
228	July 9	ORDER filed 7-2-79 granting pltf. permission to take depositions by other than stenographic (tape recording) until such time as any party withdraws his consent to arrangement. (N) Gesell, J.
229	July 9	ORDER filed 7-5-79 directing that the Court's Order of 7-2-79 be amended by substituting the following language for that appearing in lines 9, 10 and 11 of the first paragraph: "on June 28, 1979, that the Timmons deposition ultimately resulted in a transcript acceptable to all parties after review by counsel for defts., discussions among all counsel, and revisions in the draft transcript, and that all counsel agree to have further depositions. . ." (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1979	
230	July 6	ANSWERS of pltf. to deft. #3's second set of interrogatories.
231	July 6	SECOND set of interrogatories of pltf. to deft. #1.
232	July 6	SECOND set of interrogatories of pltf. to deft. #4.
233	July 6	SECOND set of interrogatories of pltf. to deft. #3.
234	July 9	AMENDED notice of deft. #3 to take deposition of Frederick Graboske.
235	July 9	CANCELLATION of deposition notices to take depositions of Melvin R. Laird, Jack L. Stempler, Henry A. Kissinger and Robert C. Seamans, Jr. by pltf.
236	July 10	STIPULATION whereby counsel for pltf. and deft. Heldeman agree that the pltf. will have through 7-23-79 within which to respond to motion for entry of an Order of Judgment, approved. (N) Gesell, J.
237	July 11	MOTION to pltf. to disqualify the Dept. of Justice from representing deponents and parties herein; memo of P&A's; attachment.
238	July 18	Deposition of William E. Timmons taken on 6-15-79 for pltf.; notice of filing; original tape cassettes (3). (sealed and placed in vault in Room 1800). (Error) Exhibits 1-20.
239	July 20	MEMORANDUM of P&A's of defts. in opposition to pltfs. motion to disqualify the Dept. of Justice from representing deponents and parties herein; exhibits A-C.
240	July 23	MEMORANDUM of P&A's of pltf. in opposition to deft. #2's motion for entry of an order of judgment.
241	July 24	NOTICE of pltf. to take deposition of Jeb Stuart Magruder; attachment.

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	1979	
242	July 24	NOTICE of defts. #1 and 4 for submission of affidavit of Thomas W. Nelson; exhibits 1-4.
243	July 24	WITHDRAWAL of appearance of Sharon M. Williams and appearance of John C. Keeney, Jr. as counsel for pltf. CD/N
244	July 24	RENEWED motion of pltf. to compel production of document from GSA; memo of P&A's; attachments A and B.
245	July 26	TRANSCRIPT of proceedings of 6-5-79, pages 1-18. (Rep: I. Watson); Court copy.
246	July 26	SUPPLEMENTAL answer to pltf. to deft. #3's second set of interrogatories.
247	July 27	REPLY of defts. to pltfs. opposition to deft. #2's motion for entry of an order of judgment.
248	July 27	TRANSCRIPT of proceedings of 5-24-79, pages 1-26. (Rep: I. Watson); Court copy.
249	July 31	AMENDED notice of deft. #3 to take deposition of pltf.
250	Aug. 2	ORDER filed 7-31-79 denying motion of pltf. to disqualify the Department of Justice from representing deponents and parties. (N) Gesell, J.
251	Aug.3	OBJECTION of deft #1 to pltfs. second set of interrogatories.
252	Aug. 3	OBJECTION of deft. #3 to pltfs. second set of interrogatories.
253	Aug. 3	OBJECTION of deft. #4 to pltfs. second set of interrogatories.
254	Aug. 9	STIPULATION AND ORDER filed 8-8-79 extending time to 8-13-79 for defts. to respond to renewed motion to compel. (N) Penn, J.

Record Reference Number	Date	Proceedings
	1979	
255	Aug. 13	MEMORANDUM of P&A's by deft in opposition to pltf's. renewed motion to compel production of document from General Services Administration; attachment; attachments I & II.
256	Aug. 16	NOTICE by deft #2 to take deposition of Clark Mollenhoff; attachment.
257	Aug. 24	NOTICE of pltf. to take oral deposition of General Services Administration; attachment.
258	Aug. 27	REQUEST (first) of pltf. for admissions; exhibits 1-82.
259	Aug. 28	REQUEST of deft. that this Court exercise its discretion to strike immaterial and impertinent allegations from pltf's. second amended complaint; P&A's; attachments A and B.
260	Aug. 28	NOTICE of deft. to take the oral deposition of Richard F. Kaufman; attachment.
261	Aug. 28	NOTICE of deft. to take the oral deposition of Robert Riggs; attachment.
262	Aug. 28	NOTICE of deft. to take the oral deposition of Ronald L. Tammen; attachment.
263	Aug. 28	NOTICE of deft. to take the oral deposition of Peter Stockton; attachment.
264	Aug. 28	NOTICE by pltf. to take oral deposition of Robert C. Seamans, Jr.; attachment.
265	Aug. 28	NOTICE by pltf. to take oral deposition of Joseph Adams; attachment.
266	Aug. 28	NOTICE by pltf. to take oral deposition of Richard M. Nixon.
267	Aug. 28	NOTICE by pltf. to take oral deposition of Bryce N. Harlow.
268	Aug. 30	NOTICE by pltff. to take deposition of Nancy Brady; attachment.
269	Aug. 30	NOTICE by pltff. to take deposition of Harriet Zimmerly; attachment.

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	1979	
270	Aug 31	REVISED notice by pltf. to take deposition of Joseph Adams; attachment.
271	Aug 31	MOTION of pltf. to terminate discovery and to set dates for final motions, pretrial, and trial; memo of P&A's.
272	Aug 31	NOTICE by pltf. to take deposition of H.R. Haldeman; attachment.
273	Sept 4	RESPONSE by deft. #3 to pltfs. motion to terminate discovery and to set dates for final motions, pretrial and trial.
274	Sept 5	REPLY memorandum by pltf. in support of his renewed motion to ? production of document from GSA; attachments A and B.
275	Sept. 5	MEMORANDUM of P&A's by defts. #1 and 4 in opposition to pltfs. motion to terminate discovery and to set dates for final motions pretrial, and trial; attachment 1.
276	Sept. 5	REVISED notice to take deposition of Jeb Stuart Magruder by pltf.; attachment.
277	Sept. 5	NOTICE by deft. #3 to take deposition of David S. Julyan; attachment
278	Sept. 5	RESPONSE by pltf. to deft. #1's request that this Court exercise its discretion to strick immaterial and impertinent allegations from pltfs. second amended complaint; attachment.
279	Sept. 7	NOTICE by pltf. to take deposition of the U.S. Dept. of the Air Force; attachments (2).
280	Sept 7	STATUS CALL. Pltf. to submit particularization statement by 10-19-79; defts. to submit particularization statement by 10-30- further status call set for 11-7-79 at 4:00 p.m.; trial set for 6-2-80 at 9:30 a.m. Motion of defts. to enter an order of judgment as to Haldeman granted; granting motion of pltf. for release of certain document (Dean), granted. (Rep: I. Watson) Gesell, J.

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	1979	
281	Sept 12	NOTICE by deft. regarding oral depositions.
282	Sept 13	ORDER filed 9-7-79 granting motion of defts. for entry of an Order of Judgment as to deft. Haldeman; directing that entry of judgment be made FORTHWITH dismissing the action as to said deft. (N) Gesell, J.
283	Sept. 13	ORDER filed 9-7-79 granting motion of pltf. to compel the relase of document A-6/49 for discovery purposes. (N) Gesell, J.
284	Sept 13	ORDER filed 9-7-79 denying motion of pltf. to terminate discovery and to set dates for final motions, pretrial and trial discovery will terminate 10-7-79, pltf. to file a particularized statement of his theory of the case by 10-19-79, not to exceed 20 pages; defts, to file particularized statement(s) of their theories of defense by 10-13-79, not to exceed 10 pages; setting a status conference on 11-7-79 at 4:00 p.m.; setting trial for 6-2-80. (N) Gesell, J.
285	Sept. 13	NOTICE by deft, #3 that the depositions of Peter Stockton, Richard F. Kaufman, Ronald L. Tammen and Julian Julyan previously noticed for Sept. 10, 12, 13 and 14, 1979 have been postponed and that the deposition of Robert Riggs noted for 9-11-79 has been cancelled.
286	Sept. 14	REVISED notice by pltf. to take deposition of Jeb Stuart Magruder; attachment.
287	Sept. 17	MOTION by Jeb Stuart Magruder for a protective order continuing his deposition until 10-8-78; memo of P&A's.
288	Sept. 18	JUDGMENT filed 9-17-79 for deft. H.R. Halderman against pltf. A. Ernest Fitzgerald and dismissing the complaint as to said deft. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1979	
289	Sept. 18	NOTICE by pltf. to take deposition of John Dean; attachment.
290	Sept. 20	REVISED notice by pltf. to take deposition of deft. Bryce N. Harlow.
291	Sept. 20	SECOND revised notice by pltf. to take deposition of Jeb Stuart Magruder; attachment.
292	Sept. 21	SUBMISSION by deft. Nixon with respect to the release of White House documents and asserted claims of privilege with respect thereto.
293	Sept. 21	UNREDACTED set of documents L1, S1, S2, S3, S4, S6, S7, A1, L1*, L2, L3, L4, L5, L6, and L7 filed and sealed by direction of the Court. (placed in vault).
294	Sept. 21	COPY of redacted documents produced to pltf. Fitzgerald on Sept. 11, 1979 filed and sealed by direction of the Court. (placed in vault)
295	Sept. 25	ORDER filed 9-21-79 granting motion of Jeb Stuart Magruder continuing his deposition; continuing said deposition until 10-8-79 at the offices of Hogan & Hartson; modifying Court's order of 9-7-79 rediscovery schedule to the extent consistent with this Order; discovery will terminate at the conclusion of Magruder's deposition. (N) Gesell, J.
296	Sept. 25	ORDER filed 9-21-79 upholding deft. Nixon's objections to production of certain documents; directing that production to pltf. will be limited to the redacted set of documents that deft. Nixon has previously transmitted to pltf. (N) Gesell, J.
297	Sept. 25	ORDER filed 9-21-79 denying request of deft. Nixon that the Court exercise its discretion to strike certain allegations from the second amended complaint. (N) Gesell, J.

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	1979	
298	Sept. 24	RESPONSE by defts. #1 and 4 to pltfs. first request for admissions.
299	Sept. 25	ANSWERS and objections by deft. Nixon to pltfs. first request for admissions.
300	Sept. 27	MOTION of pltf. for an order establishing a final production date for documents in the custody of any party; memo of P&A's; attachments 1-5.
301	Oct. 5	NOTICE of appeal by pltf. from Order of 9-7-79, $5.00 paid and credited to U.S. Copies mailed to Mark S. Landman and R. Stan Mortenson.
302	Oct. 9	COPIES of notice of appeal and docket sheets transmitted to USCA. USCA #79-2201.
303	Oct. 11	$65.00 USCA docketing fee paid and credited to U.S.
304	Oct. 15	DEPOSITION of David G. Wilson taken 7-12-79; exhibits 21-26.
305	Oct. 15	NOTICE by pltf. that the signed transcript of the deposition of David G. Wilson with exhibits and original tape cassettes (2) have been filed with the Court on this date.
306	Oct. 15	ORIGINAL tape cassettes (2) by pltf.
307	Oct. 19	OPPOSITION of deft. #3 to pltfs. motion for an order establishing a final production date for documents in the custody of any party.
308	Oct. 19	MORE particularized statement of claim by pltf.; Appendix; attachments A-D.
309	Oct. 22	MOTION by pltf. for an order that certain of pltfs. requested admissions be deemed admitted by deft. Nixon; memo of P&A's; attachment.
310	Oct 22	ERRATA by pltf. to page 3 of pltfs. more particularized statement claim filed 10-19-79; page 3 attached.

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	1979	
311	Oct. 23	NOTICE by defts. of submission of affidavit; affidavit of H.R. Haldeman.
312	Oct. 30	ORDER filed 10-25-79 denying motion of pltf. for an order establishing a final production date for documents without prejudice. (N) Gesell, J.
313	Oct. 29	RESPONSE by deft. Nixon to pltfs. motion that certain of pltfs. requested admissions be deemed admitted.
314	Oct. 30	NOTICE by pltf. of filing of deposition; transcript of deposition; exhibits 27, 28-A & B, 29-A & B, 30, 31(A), 32, 33, 34, 35, 36(A) 36(B), 38 (A) & (B), 39-41(A), 41(B) & 42; taped deposition of William W. Woodruff (4).
315	Oct. 31	PARTICULARIZED STATEMENT by defts. of their theories of defense to pltf's. causes of action; appendix; exhibit 47; attachments 1 thru 9.
316	Nov. 6	REPLY by pltf. to deft. #3's response to pltfs. motion that certain of pltfs. requested admissions be deemed admitted.
317	Nov. 8	NOTICE OF SUBMISSION OF AFFIDAVIT; Affidavit of Lloyd H. Cornett, Jr.; Exh. A.
318	Nov. 8	STATUS REPORT of pltfs.; Attachments A-D.
319	Nov. 8	TRANSCRIPT OF PROCEEDINGS of 9/7/79; courts copy pg. 1-70 reporter; Ida Z. Watson.
320	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/14/79 for the deft.
321	Nov. 8	DEPOSITION OF A. Ernest Fitzgerald taken 8/16/79 for the deft.
322	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/16/79 for the deft.
323	Nov. 8	DEPOSITION of Arthur Ernest Fitzgerald taken 8/17/79 for the deft.
324	Nov. 8	DEPOSITION of Arthur Ernest Fitzgerald taken 8/20/79 for the deft.

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	1979	
325	Nov. 8	DEPOSITION of Arthur Ernest Fitzgerald taken 8/21/79 for the deft;
326	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/27/79 for the deft.
327	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/28/79 for the deft; exhibits.
328	Nov. 15	STATUS report by deft. Nixon.
329	Nov. 15	RECORD on appeal delivered to USCA; receipt ackn.
330	Nov. 15	DEPOSITION of Clark R. Mollenhoff taken on 8-23-79.
331	Nov. 15	DEPOSITION of Clark R. Mollenhoff taken on 8-23- and 8-24-79 (Exhibits 38-72 of Nixon; 73 and 73-B thru 73E of Harlow and Butterfield); pltfs. exhibits 43-46).
332	Nov. 15	DEPOSITION of CLARK R. MOLLENHOFF taken on 8-24-79.
333	Nov. 16	DEPOSITION of Robert C. Seamans, Jr. taken on 9-18-79 for pltf., Vol. I.
334	Nov. 16	DEPOSITION of Robert C. Seamans, Jr. (continued) taken on 9-19-79 for pltf., Vol. II.
335	Nov. 16	DEPOSITION of Robert C. Seamans, Jr. (continued) taken on 9-21-79 for pltf., Vol, III.
336	Nov. 16	AGREEMENT of voluntary dismissal of appeal with each party paying its respective costs.
337	Nov. 19	SECOND set of interrogatories by defts. #1 and 4 to pltf.
338	Nov. 23	ORDER FILED 11-19-79, denying pltf's motion for an order that certain of pltf's requested admissions be deemed admitted by deft. Nixon directing deft. Nixon, to furnish pltf. by 12-10-79 those documents or portions thereof of the 106 pages of documents located by the Archivist in response to pltf's August sub-

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		poena duces tecum or file such documents of portions thereof with the Court, *in Camera,* accompanied by a submission setting forth his objections to production to the extent practicable, which shall be served to the pltf.; defts' witness list shall be updated by 12-10-79; deft Nixon, shall produce by 12-10-79 all entries in the presidential daily logs for November and December, 1969, and January, 1970, reflecting communications with Bryce Harlow, Melbin Laird, Robert C. Seamans, Jr,. or David Packlard; parties to exchange lists of all persons each desires to depose by 1-7-80; deft., Nixon, shall notify Archives by 1-7-80 of any documents which he seeks relevant to this action; defts. shall notice and complete all discovery going to issues of liability in this case, including Magruder deposition by 2-8-80; any summary judgment motions or other pretrial motions directed to any aspect of this case; responses to pretrial motions shall be filed by 2029080; replies to responses by 3-8-80; oral argument of all pending motions set for 3-21-80 at 2:00 P.M. first Pretrial Conference set for 5-2-80 at 9:30 A.M. at which time parties shall submit a final witness list and copies of all documents which they intend to introduce at trial; second pretrial set for 5-12-80 at 9:30 A.M. at which time parties to submit proposed jury instructions proposed voir dire questions, and all evidentary objections previously exchanged; final pretrial conference set for 5-22-80 at 9:30 A.M.; Trial begin 6-2-80 at 9:30 A.M. (N) Gesell J.
339	Nov. 26	NOTICE by pltf. that the signed transcript of the deposition of Joan L. Howard with exhibits has been filed with the Court.

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340	Nov. 26	DEPOSITION of Joan Lee Howard taken on 9-12-79.
341	Nov. 26	ORIGINAL tape cassette (1) of deposition of Joan Lee Howard.
342	Nov. 26	EXHIBITS 49, 50, 51, 52, 53, 54, 55, and 56 by pltf.
343	Nov. 27	HEARING on motion. (OTBP) Rep: T. Eckstone) Gesell, J.
344	Nov. 28	NOTICE by pltf. of filing of depcsition.
345	Nov. 28	DEPOSITION of Harriet Zimmerly taken 9-6-79.
346	Nov. 28	ORIGINAL tape cassettes (2) of deposition of Harriet Zimmerly.
347	Nov. 28	EXHIBITS 24, 45, 46, 47 to deposition of Harriet Zimmerly.
348	Nov. 30	SECOND request by pltf. for production of documents to deft. #4.
349	Nov. 30	SECOND request by pltf. for production of documents to deft. #3.
350	Nov. 30	SECOND request by pltf. for production of documents to deft. #1.
351	Dec. 3	NOTICE by pltf. of filing of deposition exhibits of Robert C. Seamans, Jr.
352	Dec. 3	EXHIBITS 63, 64, 71, 72, 73, 74, 75. 76, 77, 78, 79, 80, 81, 82, 83, 84, 85. 86, 87, 88, 89, 90, 91, 92, 93, 94, 95. 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140-145 to deposition of Robert C. Seamans, Jr. (in manila envelope).
353	Dec. 4	MOTION by pltf. for an order directing Jeb Stuart Magruder to appear for the continuation of his deposition; memo of P&A's.

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354	Dec. 5	ORIGINAL record (11 vols., 12 vols.) under 3 covers, 20 depositions, 4 manila envelope of exhibits, 1 small expandable folder 2 tapes, 1 manila envelope with 4 tapes, 2 brown expandable folders of exhibits, 1 appendix with 3 rubberbands returned from USCA; receipt ackn.
355	Dec. 6	NOTICE by pltf. of filing deposition exhibits. (in manila folder)
356	Dec. 6	EXHIBITS 65, 66 and 70 to deposition of Robert C. Seamans, Jr.
357	Dec. 7	NOTICE by pltf. of filing of deposition.
358	Dec. 7	DEPOSITION of Joseph John Adams taken 9-12-79; exhibits 57-62.
359	Dec. 7	ORIGINAL tape cassettes (2) of deposition of Joseph John Adams (in manila envelope).
360	Dec. 10	NOTICE by deft. Nixon to take deposition of Melvin R. Laird; attachment.
361	Dec. 10	NOTICE by deft. Nixon to take deposition of Harold Brown; attachment.
362	Dec. 10	NOTICE by deft. Nixon to take deposition of Henry A. Kissinger; attachment.
363	Dec. 10	SUBMISSION by deft. Nixon regarding identification of trial witnesses.
364	Dec. 10	AMENDED answers by deft. Nixon and objections to certain paragraphs of pltfs. first request for admissions.
365	Dec. 10	NOTICE by pltf. of filing of deposition.
366	Dec. 10	DEPOSITION of Nancy Brady taken 9-6-79; exhibit 48.
367	Dec. 10	ORIGINAL tape cassettes (2) of deposition of Nancy Brady (in manila envelope).
368	Dec. 10	SUPPLEMENTAL answers by defts. #1 and 4 to pltfs. first set of interrogatories.

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369	Dec. 13	MOTION of pltf. for an order directing Jeb Stuart Magruder to appear for the continuation of his deposition heard and granted (Rep: I. Watson) Gesell, J.
370	Dec. 19	ORDER filed 12-17-79 that deposition of Jeb Stuart Magruder be continued on 12-21-79 at 10:00 a.m. in offices of Hogan & Hartson, 815 Conn. Ave., N.W., Wash., D.C.; directing that Jeb Stuart Magruder appear at the foregoing time and place (See order for further details.) (N) Flannery, J.
371	Dec. 19	THIRD set of interrogatories by pltf. to defts.
372	Dec. 20	NOTICE by deft. Nixon to take deposition of Ronald Ziegler; attachment.
373	Dec. 20	NOTICE by deft. Nixon to take deposition of PAtrick Buchanan; attachment.
374	Dec. 20	THIRD set of interrogatories by defts. #1 and 4 to pltf.
375	Dec. 21	SECOND request for admissions by pltf. to defts. Butterfield, Harlow and Nixon; attachment.
376	Dec. 21	NOTICE by pltf. to take deposition of U.S. Dept. of Defense; attachments (2).
377	Dec. 21	AMENDED notice by pltf. to take deposition of Melvin R. Laird.
378	Dec. 26	DEPOSITION of Richard Nixon taken 10-2 and 10-3-79 for pltf.; exhibits.
379	Dec. 27	FIRST request by defts. #1 and 4 for admissions by pltf.
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380	Jan. 2	RESPONSE by deft. Nixon to pltfs. second request for production of documents.
381	Jan. 3	NOTICE by pltf. to take deposition of Jeb Stuart Magruder.
382	Jan. 4	SUBMISSION by pltf. regarding identification of trial witnesses.

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383	Jan. 7	THIRD set of interrogatories by deft. Nixon to pltf.
384	Jan. 7	THIRD request by pltf. to defts. Butterfield, Harlow and Nixon for admissions; exhibits 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111 and 112.
385	Jan. 7	RESPONSE by deft. Butterfield to pltfs. second request for documents
386	Jan. 7	RESPONSE by deft. Harlow to pltfs. second request for documents.
387	Jan. 7	FOURTH set of interrogatories by pltf. to defts.
388	Jan. 7	LIST of individuals by defts. Butterfield and Harlow they presently intend to depose.
389	Jan. 7	SUBMISSION by pltf. of deponent list.
390	Jan. 7	SECOND request by defts. Butterfield and Harlow for production of documents to pltf.
391	Jan. 7	TRANSCRIPT of proceedings of 11-16-79, pages 1-75. (Rep: T. Eckstone); Court copy.
392	Jan. 7	DEPOSITION of Byrce N. Harlow taken 10-5 and 10-6, 1979; correction sheet.
393	Jan 8	ORDER filed 1-4-80 sustaining deft. Nixon's objection to further disclosure of any of "49 papers"; directing the Clerk of Court to file under seal deft. Nixon's submission entitled "Unredacted Set of Documents". (N) Gesell, J.
394	Jan 4	UNREDACTED/documents filed and sealed and placed in vault.
395	Jan 4	SUBMISSION by deft. Nixon with respect to release of White House documents.
396	Jan 8	SUBMISSION by deft. Nixon concerning deponents.

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397	Jan 10	NOTICE by pltf. to take oral deposition; attachment.
398	Jan 10	NOTICE by pltf. to take oral deposition; attachments (2).
399	Jan 10	NOTICE by defts. to take deposition.
400	Jan 15	AMENDED notices by deft. Nixon, of oral deposition.
401	Jan 15	NOTICE by defts. #1 and 4 to take deposition of Dwight Chapin.
402	Jan 15	NOTICE by defts. #1 and 4 to take deposition of Robert P. Mayo.
403	Jan 17	NOTICE by defts. 1 and 4 to take deposition of Colonel John Badin, Jr.
404	Jan 17	NOTICE by defts. #1 and 4 to take deposition of Larry Higby.
405	Jan 17	AMENDED notice by defts. #1 and 4 to take deposition of Robert P. Mayo.
406	Jan 17	NOTICE by deft. Nixon to take deposition of John D. Ehrlichman.
407	Jan 17	ERRATA from the list of deponents served by Mr. Nixon on 1-7-80 Charles Peters, Ralph Nader and Stewart Mott.
408	Jan 18	SUBMISSION by deftfs. #1 and 4 regarding identification of potential trial witnesses.
409	Jan 18	NOTICE by defts. #1 and 4 to take deposition of James R. Schlesinger.
410	Jan 21	IDENTIFICATION of trial witnesses by pltf.
411	Jan 21	RESPONSE by defts. #1 and 4 to pltfs. second request for admission.
412	Jan 22	SECOND submission by deft. Nixon regarding identification of trial witnesses.
413	Jan 23	RESPONSE by deft, Nixon to pltfs. second request for admissions.
414	Jan 23	DEPOSITION of Patrick J. Buchanan taken 1-15-80 for deft. Nixon; exhibits.

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415	Jan 25	NOTICE by pltf. to take deposition of GSA; attachment.
416	Jan 25	NOTICE by pltf. to take deposition of Office of Management and Budget; attachment.
417	Jan 25	NOTICE by pltf. to take deposition of U.S. Dept. of Energy; attachment.
418	Jan 25	DEPOSITION of Harry R. Haldeman taken 9-27-79 for pltf.; exhibits.
419	Jan 28	NOTICE by pltf. of cancelling deposition of Jeb Stuart Magruder.
420	Jan 28	AMENDED notice by pltf. to take deposition of Robert E. Pursley.
421	Jan 28	NOTICE by defts. to take deposition of Egil Krogh.
422	Jan 28	NOTICE by defts. #1 and 4 to take deposition of Richard Nixon.
423	Jan 28	NOTICE by defts. #1 and 4 to take deposition of H.R. Haldeman.
424	Jan 29	ANSWER by pltf. to first request for admissions by defts. #1 and 4.
425	Jan 29	CANCELLATION by pltf. of deposition notice to take deposition of William J. Baroody, Jr.
426	Jan 29	REVISED notice by defts. #1 and 4 to take deposition of Robert P. Mayo.
427	Jan 29	STIPULATION that any party may take the deposition of Colonel John Badin, Jr. on liability and/or damages at any time prior to 5-2-80, so ordered. (N) Gesell, J.
428	Feb 1	AMENDED notice by deft. Nixon of deposition of Melvin R. Laird.
429	Feb 4	NOTICE by pltf. to take deposition of David G Wilson; attachment.
430	Feb 4	ANSWERS by pltf. to deft. Nixon's third set of interrogatories.
431	Feb 4	MOTION by defts. #1 and 4 for enlargement of time for all parties to file summary judgment motions or other pretrial motions.

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432	Feb. 4	DEPOSITION of James R. Schlesinger taken 1-18-80 for defts.
433	Feb. 5	MOTION by the Secretary of Defense, Harold Brown, for protective order; memorandum
434	Feb. 6	SUBMISSION by defts. #1 and 4 regarding identification of expert witnesses.
435	Feb. 6	RESPONSE by defts. #1 and 4 to pltfs. third request for admissions.
436	Feb. 7	RESPONSE by deft. #3 to pltfs. third request for admissions.
437	Feb. 7	SUBMISSION by deft. #3 regarding experts.
438	Feb. 7	RESPONSE by deft. #3 to motion for protective order.
439	Feb. 7	RESPONSE by pltf. to defts. #1 and 4's second request for production of documents.
440	Feb. 8	MOTION by pltf. for an order compelling production of documents by deft. Nixon; memo of P&A's; attachment 1; exhibits A,B, and C.
441	Feb. 8	MOTION by pltf. for order compelling defts. answer to pltfs. second set of interrogatories; memo of P&A's; exhibits A-G.
442	Feb. 8	DEPOSITION of Ronald A. Ziegler taken 1-14-80 for deft. Nixon; exhibit 222.
443	Feb. 11	ORDER files 2-8-90 granting motion of defts. for enlargement of time within which to file summary judgment motions or other pretrial matters; extending time through 2-11-80.
444	Feb. 11	DEPOSITION of John Ehrlichman taken 2-4-80; index of exhibits; exhibits (attached to deposition).

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445	Feb. 11	SUBMISSION by Richard Nixon concerning his pretrial motions and the state of the record in this case; consolidated statement of material facts; attachment (in black binder with tabs).
446	Feb. 11	MOTION by deft. Nixon for summary judgment based upon the statute of limitations; table of contents and authorities; memo of P&A's
447	Feb. 11	MOTION by deft. Nixon for summary judgment on grounds of immunity and the absence of wrongful conduct; table of contents and authorities; memorandum.
448	Feb. 11	MOTION by deft. Nixon to dismiss for failure to state a claim under the Fifth Amendment or, alternatively, for partial summary judgment; table of contents and authorities; memo of P&A's.
449	Feb 11	MOTION by deft. Nixon for partial summary judgment as to pltfs. allegations concerning the OSI inquiry, punitive damages, intentional infliction of mental distress, and interference with advantageous economic relationships; table of contents and authorities; memorandum of P&A's.
450	Feb 11	MOTION by defts. #1 and 4 for leave to file brief in excess of page limitations of Local Rule 1-9(e); of P&A's.
451	Feb 12	ORDER granting defts. Butterfield and Harlow leave to file brief in excess of page limitations and memorandum of points and authorities thereof in support of motion for summary judgment. (N) Gesell, J.
452	Feb 12	MOTION by defts. #1 and 4 for summary judgment; exhibits; memorandum of P&A's; attachments 1, 2, and 3; statement of material facts.

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453	Feb 12	ORDER granting motion of defts. Butterfield and Harlow for leave to file their memorandum of P&A's in excess of thirty-five pages in support of motion for summary judgment. (N) Gesell, J.
454	Feb 13	RESPONSE by pltf. to Secretary Brown's motion for protective order.
455	Feb 15	DEPOSITION of Melvin Laird taken 2-1-80; exhibit list; exhibits.
456	Feb 19	ORDER granting motion of Harold Brown, Secretary of Defense, for a protective order subject to certain conditions. (See order for further details.) (N) Gesell, J.
457	Feb 20	DEPOSITION of Henry A. Kissinger taken 1-25-80 for deft. Nixon; exhibits.
458	Feb 21	MOTION by pltf. for enlargement of page limitations; memo of P&A's.
459	Feb 21	JOINT motion for extension of briefing dates; memo of P&A's.
460	Feb 21	DEPOSITION of Robert P. Mayo taken 1-31-80; exhibits attached.
461	Feb 22	NOTICE by pltf. of filing of deposition; attachment; exhibits 215 thru 221; taped depositions (2) of Jeb Stuart Magruder.
462	Feb 25	NOTICE by defts. to take oral deposition of Roy Anderson.
463	Feb 25	ORDER granting joint motion for extension of briefing dates; and extending time for filing responses to pretrial motions from 2-29-80 to 3-3-80 and extending time for filing replies to such responses from 3-8-80 to 3-11-80. (N) Gesell, J.
464	Feb 25	ORDER granting motion of pltf. for enlargement of page limitations and authorizing pltf. to file a single, consolidated memorandum of points and authorities, not to exceed 157 pages in length. (N) Gesell, J.

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465	Feb 29	OPPOSITION by defts. #1 and 4 to motion for order compelling defts. answers to pltfs. second set of interrogatories.
466	Mar 4	MEMORANDUM of P&A's by deft. Nixon in opposition to pltfs. motion for an order compelling production of documents.
467	Mar 4	MEMORANDUM of P&A's by deft. Nixon in opposition to pltfs, motion to compel answers to pltfs, second set of interrogatiories.
468	Mar 4	DEPOSITION of Egil Krogh taken on 2-7-80; exhibits 175-180 (in manila envelope attached to deposition).
469	Mar 4	DEPOSITION of H. R. Haldeman taken on 2-7-80; exhibits 262 and 181 (in manila envelope attached to deposition).
470	Mar 4	DEPOSITION of Alexander M. Haig taken on 1-27-80 for defts.; exhibits.
471	Mar 4	SUBMISSION by pltf. regarding his opposition to defts. summary judgment motions; statement of genuine issues; opposition by pltf. to deft. Nixon's and deft. Harlow's second and deft. Butterfield's third motions for summary judgment; exhibits and attachments list; opposition by pltf. to deft. Nixon's and deft. Harlow's second and deft. Butterfield's third motions for summary judgment; affidavit of A. Ernest Fitzgerald; exhibits. and attachments A-Q (in black binder). (Submissions and exhibits all in brown manila folder.)
472	Mar 7	DEPOSITION of Richard F. Kaufman taken on 2-1-80 for deft. Nixon.
473	Mar 7	EXHIBITS to deposition of Richard F. Kaufman (in yellow binder).
474	Mar 11	REPLY by pltf. to deft. Nixon's opposition to motion for an order compelling production of documents.

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475	Mar 11	MOTION by deft. Nixon for extension of time within which to file a reply to Fitzgerald's opposition to deft. Nixon's motion for summary judgment; memo of P&A's.
476	Mar 11	REPLY by deft. Nixon to pltfs. opposition with regard to the OSI inquiry, punitive damages, intentional infliction of mental distress, and interference with advantageous economic relationships.
477	Mar 11	REPLY by deft. Nixon to pltfs. opposition to motion for failure to state a claim under the Fifth Amendment or, alternatively, for partial summary judgment.
478	Mar 11	REPLY by deft. Nixon to pltfs. opposition to motion for summary judgment based on the statute of limitations; attachment 1.
479	Mar 11	REPLY by pltf. to defts. oppositions to motion for order compelling defts. answers to pltfs. second set of interrogatories.
480	Mar 11	REPLY by deft. Butterfield to plts. opposition to deft. Nixon and deft. Harlow's second and deft. Butterfield's third motions for summary judgment; attachment 1.
481	Mar 11	REPLY by deft. Harlow to pltfs. opposition to deft. Nixon and deft. Harlow's second and deft. Butterfield's third motion for summary judgment; exhibits A,B,C, DX45 and DX 62.
482	Mar 12	REPLY by deft. Nixon to pltfs. opposition with regard to immunity and absence of wrongful conduct; attachment.
483	Mar 13	ORDER granting motion for extension of time; extending time through 3-12-80 within which replies to pltfs. opposition to the pending motions for summary judgment may be filed. (N) Gesell, J.

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484	Mar 18	SUBMISSION by deft. Nixon of deposition citations.
485	Mar 18	SUBMISSION by deft. Nixon of a chart concerning the undisputed issues in this case; attachment.
486	Mar 20	SUBMISSION of corrections by pltf. to deft. Nixon's chart concerning the undisputed facts in this case; attachment.
487	Mar 20	SUPPLEMENTATION of record by pltf. in response to defts. replies to pltfs. opposition to motions for summary judgment with respect to the statute of limitations; attachment A; attachment; attachment B.
488	Mar 21	MOTIONS heard and taken under advisement. (Rep: I. Watson) Gesell, J.
489	Mar 24	SUPPLEMENTAL answers by pltf. to interrogatory 84 of defts. first interrogatories and interrogary 15 of deft. Nixon's secons set of interrogatories; Appendices A, B, and C.
490	Mar 24	SUPPLEMENTAL answer by pltf. to interrogatory NO. 4 of deft. Nixon's third set of interrogatories.
491	Mar 24	DEPOSITION of Roy A. Anderson taken on 2-29-80.
492	Mar 24	ORDER granting in part and denying in part motion of pltf. for an order compelling production of documents; granted as to the memorandum for Fonald L. Ziegler from Jerry Warren dated 9-18-73 and memorandum from Len Garment to Mel Laird dated 9-14-73. (N) Gesell, J.
493	Mar 26	ORDER granting in part and denying in part motions of defts. for summary judgment; changing time of Pretrial #2 to 5-12-80 at 2:00 p.m. and rescheduling trial for 6-4-80 at 9:30 a.m. (See order for further details.) (N) Gesell, J.

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494	Mar 26	MEMORANDUM regarding statute of limitations denying motions of each deft. for summary judgment on grounds that suit is barred by the statute of limitations. (N) Gesell, J.
495	Apr 2	NOTICE by pltf. to take deposition of the National Broadcasting Co., Inc.; attachments (2).
496	Apr 8	DEPOSITION of Dwight L. Chapin taken 1-17-80; exhibits.
497	Apr 8	MOTION by deft. Nixon to shorten time for response to request for production of documents; memorandum; attachments A and B.
498	Apr 8	SECOND request by Richard Nixon, deft., for production of documents by pltf.
499	Apr 8	NOTICE by deft. Nixon to take deposition of John Bodner, Jr.; attachments (2).
500	Apr 9	SUPPLEMENTAL submission by defts. #1 and 4 regarding trial witnesses.
501	Apr 9	NOTICE by defts. #1 and 4 to take deposition of Dr. Gardner.
502	Apr 9	NOTICE by defts. #1 and 4 to take deposition of Lloyd M. Doehrmann.
503	Apr 9	NOTICE by defts. #1 and 4 to take deposition of Mrs. Neil B. Fitzgerald.
504	Apr 9	NOTICE by defts. #1 and 4 to take deposition of David H. Moran.
505	April 9	NOTICE by defts. #1 and 4 to take deposition of Frank Shrontz.
506	April 9	NOTICE by defts. #1 and 4 to take deposition of Joseph Aragon.
507	April 9	FURTHER identification of trial witnesses by pltf.
508	Apr 10	MOTION by defts. #1 and 4 for a new order regarding their motion for summary judgment; memo of P&A's.
509	Apr 11	NOTICE by defts. #1 and 4 to take deposition of Henry Durham.

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510	**Apr 11	AMENDED notice by defts. #1 and 4 to take deposition of David H. Moran.
511	*Apr 10	NOTICE of appeal by deft. #1 from order of 3-26-80. Govt. no fee. Copies mailed to Peter Raven-Hansen and R. Stan Mortenson.
512	*Apr 14	COPIES of notice of appeal and docket entries transmitted to USCA. USCA #80-1406.
513	Apr 11	NOTICE by deft. Nixon to take deposition of Charles G. Peters, Jr.; attachments (3).
514	April 11	MOTION by deft. Nixon to supplement order of 3-26-80; memo of P&A's.
515	Apr 11	MOTION by deft. Nixon to set date for deposition of Secretary Harold Brown; memo of P&A's.
516	Apr 11	NOTICE by deft. Nixon to take deposition of Rep. Andrew Jacobs; attachments (2).
517	**Apr 11	NOTICE by deft. Nixon to take deposition of William Sollee;
518	Apr 11	NOTICE of appeal by deft. Nixon from order of 3-26-80. Copies mailed to Peter Raven-Hansen and Mark S. Landman.
519	*Apr 14	COPIES of notice of appeal and docket entries transmitted to USCA. USCA #80-1407.
520	Apr 10	NOTICE of appeal by deft. #4 from order of March 26, 1980. Govt. no fee. Copies mailed to Peter Raven-Hansen and R. Stan Mortenson.
521	*Apr 14	COPIES of notice of appeal and docket entries transmitted to USCA. USCA #80-1408.
522	Apr. 15	RESPONSE of Secretary of Defense Harold Brown to deft. Nixon's motion to set date for deposition.

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523	Apr. 15	$70.00 paid for notice of appeal and docketing fee by deft. Nixon and credited to U.S.
524	Apr. 15	OFFER of judgment by deft. Nixon.
525	Apr. 15	SECOND supplemental submission by defts. #1 and 4 regarding trial witnesses.
526	Apr. 15	MOTION by deft. Nixon for continuance of pretrial and trial dates; memorandum.
527	Apr. 16	RETURN on service on William L. Woodruff, Hughes Aircraft Co. of subpoena and fees; attachments (2).
528	Apr. 16	RETURN on service on the National Broadcasting Co. of subpoena and fees; attachments (3).
529	Apr. 16	RETURN on service on Joan Lee Howard, National Archives and Records Service of subpoena and fees; attachments (2).
530	Apr. 16	SECOND submission by deft. Nixon regarding experts.
531	Apr. 17	OPPOSITION by pltf. to defts. motions to supplement this Court's order of 3-26-80.
532	Apr. 17	OPPOSITION by pltf. to deft. Nixon's motion for continuance of pretrial and trial dates; attachments A and B.
533	Apr. 18	ORDER filed 4-16-80 granting motion of deft. Nixon to set date for deposition of Secy. Harold Brown; directing that said deposition be taken on 4-19-80 at 11:00 a.m. in accordance with the procedure set out in Court's order of 2-15-80. (N) Gesell, J.
534	Apr. 21	AMENDED notices by deft. Nixon to take depositions of William Sollee, Ronald Tammen, and David Julyan.
535	Apr. 21	NOTICE by defts. #1 and 4 to take deposition of John R. Glennie.
536	Apr. 21	NOTICE by defts. #1 and 4 to take deposition of H. Patrick Swygert.

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537	Apr. 22	NOTICE by deft. Nixon to take deposition of Senator William Proxmire.
538	Apr. 22	AMENDED notice by deft. Nixon to take depositions of Ronald Tammen and David Julyan.
539	April 22	RETURN on service of subpoena for James R. Schlesinger; attachment.
540	April 22	RETURN on service of subpoena for Ronald L. Ziegler; attachment.
541	April 23	ORDER filed 4-18-80 denying motions of defts. to supplement the Court's order of 3-26-80. (N) Gesell, J.
542	April 23	ORDER filed 4-18-80 denying motion of deft. Nixon for continuance of pretrial and trial dates; extending time through 5-2-80 for final designation of witnesses for good cause shown. (N) Gesell, J.
543	April 24	NOTICE by deft. Nixon to take deposition of John Bodner; attachments (2).
544	April 24	RETURN on service of subpoena for Frederick J. Graboske; attachments (2).
545	April 24	REQUEST to USCA for an expedited hearing. (N) Gesell, J.
546	April 29	NOTICE by deft. Nixon to take deposition of pltf.
547	April 29	AMENDED notice to take deposition of H. Patrick Swygert.
548	April 30	FURTHER identification of trial witnesses (3) by pltf.
549	May 1	COPY of ORDER USCA filed 4-30-80 granting appellee's motions to dismiss and for expedited consideration of motion.
550	May 1	MOTION of defts. Butterfield & Harlow to extend discovery for the deposition of H. Patrick Swygert; attachment A & B.
551	May 2	LIST of trial witnesses by pltf.
552	May 2	TRIAL exhibits by pltf.

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	1980	
553	May 2	PRETRIAL PROCEEDINGS. Motion of defts. to extend discovery for the deposition of Swygert, granted. (Rep: I. Watson) Gesell, J.
554	May 6	ORDER filed 5-2-80 granting motion of defts. Butterfield and Harlow to extend discovery for the deposition of H. Patrick Swygert and directing that said deposition may be taken on or before 5-9-80. (N) Gesell, J.
555	May 7	ORDER filed 5-5-80 denying motion of pltf. for order compelling defts. answers to second set of interrogatories. (N) Gesell, J.
556	May 7	TRANSCRIPT of proceedings of 3-21-80, pages 1-66. (Rep: I. Watson) Gesell, J.
557	May 7	MOTION by deft. #4 in liminine to exclude White House tape recorded conversations; memo of P&A's; attachment 1; exhibit 160.
558	May 7	MEMORANDUM by pltf. concerning the handling of White House tapes and transcripts at trial.
559	May 7	STATEMENT of issues by defts. #1 and 4 which should be resolved prior to trial.
560	May 9	PROPOSAL by pltf. concerning designation of depositions.
561	May 9	LIST of issues to be resolved through pretrial by pltf.; attachment.
562	May 9	OPPOSITION by pltf. to deft. #4's motion in limine; attachment.
563	May 9	MOTION by pltf. to exclude witnesses not listed in answers to his interrogatory requiring the identification of trial witnesses.
564	May 9	PRETRIAL memorandum by pltf. concerning exclusion of settlement exhibits and witnesses; attachment; attachments A-E.

Record Reference Number	Date	Proceedings
	1980	
565	May 12	RESPONSE by pltf. to defts. joint statement of issues which should be resolved prior to trial.
566	May 12	SUBMISSION by pltf. of objections to defts. trial exhibits; attachment.
567	May 12	REQUESTS by pltf. for jury instructions and request for preliminary instructions
568	May 12	SUBMISSION by defts. Alexander P. Butterfield and Bryce N. Harlow regarding identification of expert witnesses.
569	May 12	PRETRIAL: Deft. Harlow's objections to tapes denied; further pretrial 05-16-80 at 10:00 A.M. (Rep: Watson) Gesell, J.
570	May 14	CONSPIRACY contentions by pltf.
571	May 14	RETURN on service; attachments (2).
572	May 14	JOINT opposition by defts. to pltfs. request to exclude all witnesses with information concerning pltfs. recent attempts to gain other employment.
573	May 15	DEPOSITION of Dr. Ray Gardner taken 4-30-80; attachment.
574	May 15	REPLY by pltf. to defts joint opposition to his request to exclude settlement exhibits and witnesses; attachments (2).
575	May 16	DEPOSITION of Frank Shrontz taken 4-22-80.
576	May 16	JOINT response of defts. to pltfs. reply to defts. joint opposition to his request to exclude settlement exhibits and witnesses.
577	May 16	FIRST submission by deft. Nixon regarding pltfs. proposed jury instructions.
578	May 16	JOINT response by defts. to pltfs. proposed pretrial order No. 1.
579	May 16	SUBMISSION by deft. Nixon of proposed form of verdict; attachment.
580	May 16	STIPULATION re; appointment of L.J. Evans and employment of Richard L. Burtner.

Record Reference Number	Date	Proceedings
	1980	
581	May 16	PRETRIAL proceedings. (I. Watson) Gesell, J.
582	May 19	DESIGNATION of deposition testimony by pltf.
583	May 20	FIRST designation of deposition testimony by pltf.
584	May 20	MOTION by defts. for a stay; memo of P&A's.
585	May 20	DEPOSITION of Albert O. Cornelison, Jr. taken 4-16-80 for defts.
586	May 20	DEPOSITION of John Bodner, Jr. taken 4-16-80 for defts.
587	May 20	DEPOSITION of Andrew Jacobs, Jr. taken 4-25-80 for defts.
588	May 20	DEPOSITION of Charles Peters taken 4-25-80 for defts.
589	May 22	DEPOSITION of Lloyd Doehrmann taken 4-24-80 for defts. #1 and 4.
590	May 22	MOTION by defts to stay heard & granted. Pretrial cancelled & trial postponed indefinitely. (R. Weber, Reporter) Gesell, J.
591	May 28	ORDER filed 5-22-80 granting motion of all defts to stay; staying all proceedings; cancelling pretrial; continuing trial date indefinitely. (N) Gesell, J.
592	June 12	DEPOSITION of William Proxmire taken 5-1-80; exhibits.
593	June 12	DEPOSITION of onald L. Tammen taken 4-29-80; exhibits.
594	June 27	DEPOSITION of Henry Durham taken 4-29-80 for defts.; errata sheet.
595	Aug 7	COPY of ORDER filed 4-30-80 granting appellee's motion to dimiss the appeal.
596	Aug 27	DEPOSITION of David H. Moran taken 4-26-80 for defts.; Exhibit.

Record Reference Number	Date	Proceedings
	1980	
597	Aug 27	DEPOSITION of Nell B. Fitzgerald taken 4-28-80 for defts.
598	Aug 27	DEPOSITION fo David S. Julyan taken 4-29-80 for deft. #3; Exhibit.
599	Aug 27	DEPOSITION of John R. Glennie taken 5-2-80 for defts.; Exhibit.
600	Oct 30	CERTIFIED copy of ORDER USCA filed 4-30-80 granting appellee's motion to dismiss.
601	Dec 16	TRANSCRIPT of proceedings of 15-16-80, pages 1-172. (Rep: I. Watson) Court copy.
	1981	
602	Feb 17	DEPOSITION of Frederick J. Graboske taken 7-9-70 for defts.; errata.
603	Sept 16	RECORD on appeal (6 boxes) with sealed material (6 envelopes) delivered to U.S. Supreme Court.
604	Oct 9	DEPOSITION of Richard Nixon taken 2-7-80; exhibits; attachment.

IN THE
United States District Court
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178

A. ERNEST FITZGERALD,
Plaintiff,

v.

ALEXANDER P. BUTTERFIELD,
H. ROBERT HALDEMAN,
RICHARD M. NIXON,
BRYCE N. HARLOW,
Defendants.

ORDER
[Filed April 27, 1979]

Upon consideration of the defendants' motions to dismiss or, in the alternative, for summary judgment, the opposition thereto, the entire record herein, and the oral arguments of counsel, it is hereby

ORDERED that the defendants' motions to dismiss or in the alternative for summary judgment are denied in the following respects:

A. *Causes of Action*

1. Plaintiff states a cause of action under the First Amendment to the United States Constitution based on defendants' alleged retaliation for plaintiff's having exercised his rights of free speech and petition. *Mount Healthy City School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274, 283-84 (1977); *Perry* v. *Sindermann*, 408 U.S. 593, 596-98 (1972). In addition, a damage remedy lies for such a violation. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Dellums* v. *Powell*, 566 F.2d 167, 194-96 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (U.S. July 3, 1978).

2. Plaintiff states a cause of action for damages under 5 U.S.C.A. § 7211 (1979 pocket part). *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975). The plaintiff is part of the class for whose especial benefit the statute was enacted. *See* Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555 (provision originally placed at end of section protecting civil servants from capricious removals); 48 Cong. Rec. 4493, 5625-27, 5633-36, 10671-75 (1912). There exists no indication of a legislative intent to deny a private remedy under the provision, and implication of such a remedy is not inconsistent with the underlying purposes of the legislative scheme and impinges on no area fundamentally the concern of the states.

3. Plaintiff states a cause of action for damages under 18 U.S.C. § 1505. That statute punishes anyone who "injures any . . . witness in his person or property . . . on account of his testifying or having testified" before a committee of the Congress. From this phraseology, it appears that plaintiff is a member of a class for whose especial benefit the statute was, at least in part, enacted. This conclusion is confirmed by the provision's legislative history. *See* S. Rep. No. 225, 79th Cong., 1st Sess. (1945); H.R. Rep. No. 1143, 76th Cong., 1st Sess. (1939); 84 Cong. Rec. 9312, 10910-12 (1939). The other factors listed in *Cort* v. *Ash, supra,* are satisfied. Of particular significance is the fact that 5 U.S.C.A. § 7211 (1979 pocket part) and 18 U.S.C. § 1505 may not in the context of this case overlap in all pertinent respects; yet implication of a private damage remedy under the first provision but not the second would not seem to make much logical sense. Furthermore, the Supreme Court has emphasized that, in appropriate circumstances, private damage remedies may be inferred from penal statutes. *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201-02 (1967).

4. Plaintiff states a cause of action under D.C. law for intentional interference with (existent and prospective) economic advantage. *Carr* v. *Brown*, No. 12922, slip op. at 8-10 (D.C. Ct. App. Nov. 24, 1978); *Dunn* v. *Cox*, 163 A.2d 609, 611 (D.C. Mun. App. 1960); *Alfred A. Altimont, Inc.* v. *Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C. Ct. App. 1977).

5. Plaintiff states a cause of action under D.C. law for intentional infliction of mental distress by extreme and outrageous conduct. *Clark* v. *Associated Retail Credit Men*, 105 F.2d 62, 64-65 (App. D.C. 1939); *Mosely* v. *Bank of Virginia*, No. 5573-77 (D.C. Super. Ct. June 19, 1978).

B. The service of process effected on defendants Nixon and Harlow was proper, Fed. R. Civ. P. 4(d)(7), (e) & (f); D.C. Code §§ 13-423(a) (3), 13-424, 13-431; *United States* v. *First National City Bank*, 379 U.S. 378, 381 (1965), and this court has personal jurisdiction over those two defendants as well, *see International Shoe Co.*. v. *Washington*, 326 U.S. 310, 316-19 (1945); *Briggs* v. *Goodwin*, 569 F. 2d 1, 8-10 (D.C. Cir. 1977); D.C. Code § 13-423(a) (3); 2 Moore, Federal Practice ¶4.25[7].

C. *Nixon*

1. By reason of the doctrine of "fraudulent concealment," this suit is not time-barred as against defendant Nixon. *Fitzgerald* v. *Seamans*, 553 F. 2d 220, 228-29 (D.C. Cir. 1977). It was not until June 1978 that plaintiff discovered facts so sufficiently implicating Nixon in the subject matter of this case as to meet the requirements of Fed. R. Civ. P. 11; with due diligence plaintiff could not have discovered these facts at any earlier date.

2. To establish either arguably applicable immunity defense, the President must show that he was acting "within the outer perimeters" of his responsibilities. *Butz* v. *Economou*, 46 U.S.L.W. 4952 (June 29, 1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F. 2d 289 (D.C. Cir. 1977) (en banc), *cert. denied*, 46 U.S.L.W. 3803 (U.S. July 3, 1978). At this stage of the litigation, the Court cannot conclude that Nixon was acting within the outer perimeters of his duties when he performed the acts which the complaint alleges he performed.

a. There exist genuine issues of fact as to Nixon's conduct in connection with the subject matter of this suit.

b. By statute and regulation, the President had no authority to hire, discharge or interfere with the employment of an employee such as Fitzgerald. 5 U.S.C. § 7512 (1976); 10 U.S.C. § 8012(e); 5 C.F.R. § 6.3; *Fitzgerald* v. *Hampton*, 467 F.2d 755, 762 (D.C. Cir. 1972).

c. Other statutory provisions as well bar the President from doing what he is alleged to have done. 5 U.S.C.A. § 7211 (1979 pocket part); 18 U.S.C. § 1505.

Therefore, at this stage, the Court will not decide whether defendant Nixon may be protected by an absolute or qualified immunity defense.

3. The issues raised against defendant Nixon are justiciable under *Baker* v. *Carr*, 369 U.S. 186 (1962). Arguments flowing from the separation of powers or resting upon the risks inherent in permitting civil damage actions against past or present Presidents for acts performed while in office are more appropriately addressed when determining the kind of immunity from suit which the President should enjoy.

D. *Harlow*

1. Plaintiff's claims against defendant Harlow are not time-barred. Only sometime after October 1977 did plaintiff find out about Harlow's conversations with Seamans during the spring of 1969. Fitzgerald Affidavit of July 5, 1978, ¶6; Mollenhoff Affidavit of Aug. 1, 1978, ¶7. Plaintiff could not have with due diligence discovered this information prior to that date.

2. Genuine issues of fact remain as to the scope of Harlow's responsibilities, as to the nature of his actions in the Fitzgerald matter beginning in the spring of 1969, and as to whether such actions as he did take were performed in good faith. Accordingly, summary judgment cannot be granted at this time to defendant Harlow based on any claim of immunity, whether he be entitled to assert an absolute or qualified immunity.

E. *Butterfield*

1. Plaintiff's claims against defendant Butterfield are not time-barred. Discovery has not revealed any further information bearing on plaintiff's due diligence since the opinion of the Court of Appeals in *Fitzgerald v. Seamans, supra.*

2. Genuine issues of fact remain as to the scope of Butterfield's responsibilities, as to the nature of his actions in the Fitzgerald matter beginning in the spring of 1969, and as to whether such actions as he did take were performed in good faith. Accordingly, summary judgment cannot be granted at this time to Butterfield by reason of any immunity defense, whether he be entitled to claim an absolute or a qualified immunity.

ORDERED that defendants' motions to dismiss or, in the alternative, for summary judgment are granted in the following respect:

Plaintiff's action against defendant Haldeman is time-barred. The statute of limitations was no longer tolled by operation of the "fraudulent concealment" doctrine once plaintiff had sufficient facts to put him on notice that he had a potential claim. *See Emmett* v. *Eastern Dispensary & Casualty Hospital,* 396, F.2d 931, 937-38 (D.C. Cir. 1967); *Westinghouse Electric Corp.* v. *City of Burlington, Vermont,* 351 F.2d 762, 764 (D.C. Cir. 1965); *Cole* v. *Kelley,* 438 F. Supp. 129, 139 (C.D. Cal. 1977). Plaintiff filed his First Amended Complaint naming Haldeman on June 27, 1977. Plaintiff, however, knew that Haldeman was actively involved in the Fitzgerald matter after having taken the deposition of Butterfield on June 15, 1974. *See* Butterfield deposition at 260, 271, 298, 324. *See also* Butterfield Memorandum of Jan. 20, 1970, addressed specifically to Haldeman (Discovered by Plaintiff in August, 1973).

ORDERED that, plaintiff having withdrawn his claim under the Ninth Amendment to the United States Constitution, his claim for unconstitutional and common-law invasion of privacy, and his claims under 42 U.S.C. §§ 1985(3) & 1986, these claims be and hereby are dismissed; and it is further.

ORDERED that, since the issue is currently before the Supreme Court, *see Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc), *cert. granted*, 47 U.S.L.W. 3301 (U.S. Oct. 20, 1978), of whether or not, under the rational of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra*, a private damage remedy may be based on a Fifth Amendment violation, this Court will not now decide whether plaintiff states a cause of action under the Fifth Amendment.

/s/ GERHARD GESELL
United States District Judge

April 26, 1979.

UNITED STATES
CIVIL SERVICE COMMISSION

APPEALS EXAMINING OFFICE
WASHINGTON, D.C. 20415

Decision

ON THE APPEAL OF

A. ERNEST FITZGERALD
DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C.

Herman D. Staiman
CHIEF

ISSUED September 18, 1973

APPEAL OF A. ERNEST FITZGERALD UNDER PART 351, SUBPART I OF THE CIVIL SERVICE REGULATIONS

Appeal from the action of the Department of the Air Force in separating the appellant by reduction-in-force from the position of Deputy for Management System, GS-17, Step 4, $31,874.00 per annum, Office of the Secretary, Assistant Secretary for Financial Management, Washington, D.C. effective January 5, 1970.

INTRODUCTION

By letter dated January 20, 1970 John Bodner, Jr. and William L. Sollee, Attorneys at Law, submitted an appeal to this office in behalf of Mr. A. Ernest Fitzgerald. Investigation was conducted and numerous lengthy submissions to the file were received from both the appellant and the agency. The appellant raised a question as to the bona fides of the reduction-in-force (RIF) as it was applied to him, contending that the RIF was used as a subtufuge to conceal the agency's action in firing him because of his November 13, 1968 testimony on the C-5A cost overruns. Since Mr. Fitzgerald was a preference eligible and the various submissions to the file did constitute a prima facie showing that the reduction-in-force may have been based upon an intention to separate the appellant for cause rather than for a nonpersonal reason, a hearing was scheduled to inquire into the circumstances surrounding the RIF.

The agency was requested and agreed to make available to testify Secretary of the Air Force Robert Seamans, Assistant Secretary Spencer Schedler, Administrative Assistant to the Secretary John Lang, Deputy Administrative Assistant Thomas Nelson, Air Force Chief of Staff General John D. Ryan, Comptroller of the Air Force Lieutenant General Duward Crow, Director of Office of Special Investigations (OSI) Brigadier General Joseph J. Cappucci, and Colonel James D. Pewitt.

In accordance with the Civil Service regulations in effect at that time, the hearing was not open to the public. However, a verbatim transcript of the proceeding was prepared by an independent court reporting firm. The hearing was conducted on May 4, 5; June 16, 17, 18 and 22, 1971. On the latter date the hearing was suspended in compliance with a temporary restraining order and subsequent injunction issued by the U.S. District Court for the District of Columbia relative to the issue of an "Open Hearing". The hearing, open to the public, resumed on January 26, 1973 after all litigation on this issue had been completed. Additional hearing sessions were held on January 29, 30, 31; February 2, 28; March 5, 6, 7, 20, 21, 22, 28, 30; April 3, 4, 5, 6, 19; and May 3, 1973.

[2] Since the 1973 portion of the transcript begins again with page #1, reference to the 1971 portion of the transcript will be shown as "L/N" while reference to the 1973 portion will be shown as "TR". On May 3 & 4, 1971 the agency submitted copies of documents previously furnished to the Justice Department. The pages are numbered consecutively from 1 to 117 with two (2) pages numbered 95. This submission will be referred to as the "Justice File" and the two pages 95 will be referred to as 95a and 95b. On June 25, 1970 the agency submitted 409 pages of documents in response to the appellant's request. This submission will be referred to as "AF-6/25/70". All agency submissions will be referred to as "AF-(date)" and all appellant's submissions will be referred to as "APP-(date)". Exhibits submitted at the hearing will be referred to as "M.Ex" for management and "A.Ex" for appellant. Senator William Proxmire was Chairman of the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States. This Subcommittee will be referred to as the "Proxmire Committee". The office of the Assistant Secretary of the Air Force for Financial Management will be referred to as "SAFFM", its Air Force symbol.

Final closing arguments, in the form of no reply written briefs were received from the Air Force on July 16, 1973 and from the appellant on July 17, 1973. While the record was technically closed as of May 3, 1973 a newly discovered memorandum that had just surfaced in a Senate hearing was

submitted by the appellant on August 2, 1973. No objection or comment was offered by the agency, therefore, the document was accepted into the record.

A verbatim transcript of the entire 26 day hearing proceeding is a part of the official record in this case. The appellant was represented at the hearing by his attorneys, John Bodner, Jr. and William L. Sollee. The agency was represented by Lieutenant Colonel C. Claude Teagarden, Office of the General Counsel, Department of the Air Force, and Hugh R. Gilmore, Assistant General Counsel, Department of the Air Force. Testimony at the hearing was obtained from the appellant and thirteen of the witnesses he requested. The agency called no witnesses, and presented its case through the cross examination of appellant's witnesses, the introduction of new documents, and reliance on the material previously submitted.

ANALYSIS AND FINDINGS

By letter dated November 4, 1969 the agency gave Mr. Fitzgerald notice of his proposed separation by reduction-in-force, effective January 5, 1970, due to the abolishment of his position, "necessitated by a reorganization under the current Air Force retirement program". This notice indicated that his assignment rights were to positions in the Excepted Service. The Standard Form 50 (SF-50), Notification of Personnel Action, effecting the separation on January 5, 1970, identified the position as being in the Excepted Service.

Mr. Fitzgerald contends that he was granted career tenure in the competitive service on September 20, 1968 and that it was improperly taken away from him on November 25, 1968 after he testified as to the cost overruns on the C-5A airplane. Accordingly, we will deal with this issue first.

[3] The record reveals that on September 20, 1965 Mr. Fitzgerald received an Excepted-Conditional appointment to the position of Deputy for Management Systems, GS-301-17, in the Office of the Assistant Secretary of the Air Force for Financial Management (SAFFM). This position was excepted from the competitive service under Schedule A, Section

213.3109a of the Civil Service regulations. The appointment SF-50 clearly shows in items 12 and 28 that the appointment was to an Excepted Service position.

Effective September 20, 1968, upon Mr. Fitzgerald's completion of three (3) years in the Excepted Service a new SF-50 was issued. In item 12 the nature of the action was shown as a conversion to career tenure; in item 14, the Civil Service authority was shown as Reg. 315.202; and in item 28 the position occupied was shown as being in the Excepted Service. On November 25, 1968 a new SF-50 was issued correcting item 12 of the September 6, 1968 SF-50 to reflect conversion to Excepted appointment and correcting item 14.

Mr. Fitzgerald contends that based upon the September 1968 SF-50 he was converted from the Excepted to the Competitive service and that the corrected SF-50 of November 25, 1968 improperly took away his career tenure in the competitive service.

Section 6-5, Rule VI of the Civil Service Rules relating to excepted employees states:

> "No person who is serving under an excepted appointment shall be assigned to the work of a person in the competitive service without prior approval of the Commission."

Section 315.701, Part 315 of the Civil Service regulations concerning conversion of incumbents of positions brought into the competitive service, states:

> "(b) An agency, within the time limits set forth in paragraph (c) of this section, may recommend that the employment of an employee covered by paragraph (a) of this section be converted to career or career-conditional employment.
>
> (d) When the Commission approves the agency's recommendation submitted under paragraph (b) of this section, the employee becomes:

(1) A Career conditional employee . . .
(2) A Career employee . . ."

It is clear from the evidence of record, and we so find that the Air Force did not request or receive approval from the Commission to move Mr. Fitzgerald from the excepted service to the competitive service or to move his position [4] from the excepted to the competitive service (A.Ex #1; A.Ex #7, P 286-287; Justice File, P-7; AF-6/25/70, P-114; AF-1/30/70; and TR 2768-2769).

Contrary to the appellant's contention, the perfunctory forwarding of a file copy of every SF-50 to the Civil Service Commission is not an agency recommendation or request for prior Commission approval nor does this serve as the prior approval by the Civil Service Commission for any conversion from the Excepted to the Competitive Service.

Since the Air Force never recommended, requested, or received prior approval from the Civil Service Commission to convert Mr. Fitzgerald from the Excepted Service to the Competitive Service the Air Force was clearly without authority to take this action. Therefore, we find that the original conversion action of September 1968 was null and void, and that it was properly corrected by the agency on November 25, 1968.

The agency has contended that the initial SF-50 of September 1968 resulted from a computer error. This is borne out by the fact that item 28 of that SF-50 showed the position occupied to be in the Excepted Service. It is further borne out by item 14 which cited the Civil Service Authority as Regulation 315.202. Section 315.202 of Part 315 of the Civil Service regulations states:

> "A career-conditional employee becomes a career employee automatically on completion of the service requirement for career tenure."

The service requirement for conversion from career conditional to career as set forth in Section 315.201 is three (3) years. Mr. Fitzgerald did not receive a Career-Conditional appointment, he received an Excepted-Conditional appointment.

Therefore, he had no entitlement to the automatic conversion from Career-Conditional to Career that Section 315.202 provides.

In view of the foregoing, we find that Mr. Fitzgerald was properly in the Excepted Service at the time of his separation on January 5, 1970 and that he had no entitlement to Career tenure in the Competitive Service.

Turning now to the reduction-in-force action itself, the agency's position is that as part of Defense Department's Project 703, the Air Force was required to reduce expenditures one (1) billion dollars in fiscal year 1970. This involved large cut-backs in military and civilian personnel nationwide and in the headquarters staff of the Department. Each office in the Secretariat was given a specific number of reductions to be effected. SAFFM was assigned a net reduction of two (2) spaces. As part of a reorganization of that office five (5) positions were abolished and three (3) new positions were established. Of the five (5) positions abolished Mr. Fitzgerald's was the only professional position. The other four (4) were secretarial positions.

[5] The agency contends that the abolishment of Mr. Fitzgerald's position, initiated by Assistant Secretary Spencer J. Schedler and approved by Secretary Robert Seamans, was based upon a valid management decision to reorganize SAFFM in order to improve its cost effectiveness capability and at the same time achieve the required reduction of two (2) spaces.

The agency further contends that Secretary Seamans and Assistant Secretary Schedler were not in office at the time of Mr. Fitzgerald's November 1968 testimony; that they alone were responsible for the decision to reorganize the financial management office; that the testimony Mr. Fitzgerald gave a year earlier was not the reason or a reason for their decision; and that neither had sought or received any instructions to abolish the appellant's position.

Mr. Fitzgerald contends that the RIF as applied to him was not for non-personal reasons and was, in essence, an agency adverse action based upon his November 13, 1968 testimony on the C-5A cost overruns.

The record reveals that out of the 80 positions abolished in the Office of the Secretary of the Air Force, Mr. Fitzgerald was the only employee who actually was issued a RIF notice and who was actually separated by RIF (L/N 723-724). As his part of the Project 703 reductions, Assistant Secretary Schedler was required to take a cut of two (2) spaces. He accomplished this by abolishing four (4) Secretarial positions plus Mr. Fitzgerald's position and creating three (3) new positions.

The Air Force, through the testimony of witnesses and documentary evidence, did show that a reorganization of SAFFM had taken place; that the appellant's position had been abolished and not recreated; and that there was some need to reorganize in addition to reducing the office staff by two (2) positions.

The appellant has not questioned the validity of the Project 703 reductions and the resultant reduction-in-force, only the agency's decision to abolish his position and include him in that RIF.

The reduction-in-force system as provided for by Statute and Commission regulations is a system for releasing employees from their competitive levels when their release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights. The system is predicated upon the concept of competition for retention based upon tenure, veterans preference, length of service and performance rating.

Reduction-in-force may be necessary because of conditions inside or outside the agency. Agency management may reduce certain phases of its work as the workload changes. Appropriations may be reduced or cut-off entirely, or the agency may be allowed to use only part of its appropriations. These and other [6] factors occurring singly or in combination may make it necessary for the agency to have a reduction-in-force.

Reduction in force may require the separation of all employees in part of an agency or may require separation of some and shifting about of others. Small reductions may require no involuntary separations, when there are enough

transfers, retirements, and other voluntary losses. Some reductions, in fact, require no reduction in the number of employees but are accomplished through reorganization.

Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located and where they are to be filled, abolished or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons related to performance or conduct or compete in reduction in force.

These are management responsibilities and the management determinations regarding these responsibilities are not ordinarily subject to review by the Civil Service Commission in a reduction-in-force appeal.

It would be a valid and proper exercise of its management prerogative for an agency faced with the necessity for reducing its force to select for abolishment those functions and/or positions that are least necessary to the accomplishment of, or are making the least substantive contribution to, the agency's mission.

In this situation the lack of substantive contribution may be due to a change in the agency's mission or its method or approach to the accomplishment of it's mission. It may also be that the lack of substantative contribution is due to the incumbent of the position.

Inherent in the Commission's reduction-in-force system and one of its fundamental precepts is that it be used only for reasons that are non-personal to the employees affected. The reduction-in-force system must not be used to remove inadequate or unsatisfactory employees in lieu of following the Commission's adverse action procedures set forth in Part 752 of the Civil Service regulations.

Federal Personnel Manual Chapter 351, Subchapter 1 states in part as follows:

"1-9. IMPROPER USE OF REDUCTION IN FORCE

> There sometimes has been a tendancy to distort the reduction-in-force system by using it to eliminate inadequate employees."

[7] Thus, an allegation that the RIF was a subterfuge to conceal an agency removal action taken without following the adverse action procedures, when supported by a sufficient showing that the RIF action may have been based upon an intention to separate the appellant rather than upon a non-personal reason for reducing the force, goes directly to the question of the bona-fides of the RIF and will be reviewed on appeal.

In order to properly evaluate the propriety of the RIF action as applied to Mr. Fitzgerald it is essential that we review and analyze the circumstances leading up to and surrounding the decision to abolish his position and to include him in the Project 703 RIF.

From our review of the complete appellate record including all submissions by both parties and the transcript of the hearing (26 days), we find the circumstances to be as follows:

Mr. Fitzgerald received an excepted appointment to the position of Deputy for Management Systems, Office of the Assistant Secretary of the Air Force for Financial Management (SAFFM) on September 20, 1965 (AF-1/30/70, Attachment #4). While no specific time limit was established as to the length of this appointment, it is clear from Mr. Fitzgerald's testimony of his conversations with the then Assistant Secretary, Dr. Leonard Marks, that it was to be for only a few years (TR 2618-2621).

Assistant Secretary Marks resigned on December 31, 1967 and was succeeded by Thomas H. Nielsen who was appointed Assistant Secretary for Financial Management on January 1, 1968 (L/N 366). Mr. Nielsen submitted a proposed reorganization plan for his office dated January 9, 1968 (AF-6/25/70, P-253) focusing additional attention on cost performance,

designating the appellant as the focal point for this effort and proposing increasing his staff.

Mr. Fitzgerald was first contacted by the Proxmire Committee in the Summer of 1968 to testify on the C-5A (TR 2720-2722). This request was put into writing by Senator William Proxmire on October 18, 1968 (APP-1/20/70, Attachment #2).

The file contains unrefuted allegations and testimony that there was high level Air Force and D.O.D. opposition to Mr. Fitzgerald testifying.

Mr. Fitzgerald did testify before the Proxmire Committee on November 13, 1968 and discussed possible cost overruns on the C-5A plane. This testimony received a great deal of publicity for it was the first public disclosure of cost overruns on that project.

In October 1968 Colonel James D. Pewitt, Special Assistant for Economic Analysis and Acting Executive Officer of SAFFM, was involved in conducting a cost review of the C-5A project. He testified that Mr. Fitzgerald used his [8] (Pewitt's) figures in testifying before the Proxmire Committee (TR 1970); that Mr. Fitzgerald's testimony was accurate; and that the numbers Fitzgerald used were the same numbers he would have used (TR 1969-1970).

On November 25, 1968 a new SF-50 was issued to Mr. Fitzgerald properly correcting an erroneous SF-50 issued on September 6, 1968 which had purportedly granted him career tenure.

By memo dated December 26, 1968, Mr. Fitzgerald furnished Assistant Secretary Nielsen copies of the September 6 and November 25, 1968 SF-50's regarding his tenure and pointed out that the November 25 revocation came less than two weeks after his appearance before Senator Proxmire's Subcommittee.

In response to a December 27, 1968 request from Assistant Secretary Nielsen, John A. Lang, Jr., Administrative Assistant to the Secretary of the Air Force submitted a memorandum explaining Mr. Fitzgerald's tenure situation (Justice File P-6).

A copy of this memo was delivered to Mr. Fitzgerald by Major Metcalf on December 31, 1968 (M.Ex #7, 1/13/69 attachment).

On January 1, 1969 a front page newspaper article appeared in the Washington Post (attachment to M.Ex #7) clearly implying that the November 25, 1968 revocation of tenure was in retaliation for Mr. Fitzgerald's testimony on the C-5A on November 13, 1968.

In response to request for information (L/N 449-451) due to the implications in the January 1, 1969 Washington Post front page article, Acting Secretary of the Air Force, Dr. Alexander N. Flax sent a memo to the Secretary of Defense dated January 2, 1969, explaining Mr. Fitzgerald's tenure situation (AF-6/25/70, P 112-116).

On Friday afternoon, January 3, 1969, Mr. Thomas Nelson, Deputy Administrative Assistant to the Secretary of the Air Force, received a request from Colonel Gunderson of the Air Force Secretary's Office to prepare a paper bringing the Secretary of the Air Force up to date on what was going on with regard to Fitzgerald, and also a discussion of what his rights were, since the Secretary had been out of the office for a week to ten days (L/N 452-453). John Lang furnished this information to Secretary Brown by memo dated January 6, 1969 (M.Ex #44). Attached thereto was a copy of Dr. Flax' memo of January 2, 1969 to the Secretary of Defense. The January 6, 1969 memo is referred to as the "Lang Memo".

Mr. Nelson testified that he assumed the request, "What are his rights" meant what are his rights when he is going to be terminated (L/N 463-466). Mr. Fitzgerald received a copy of the "Lang Memo" from Assistant Secretary Nielsen (L/N 474, 476-477) on January 8, 1969.

The Lang Memo identifies three (3) possible means of effecting Mr. Fitzgerald's departure and states in part as follows:

> [9] "As an employee in the excepted service under Schedule A, with Veterans Preference, Mr. Fitzgerald has certain rights, which can be grouped in two categories:

(1) *Adverse Actions.* Chapter 752 of the Federal Personnel Manual applies to discharges, suspensions, furloughs without pay, and reductions in rank or compensation taken by agencies against employees of the United States Government. Mr. Fitzgerald's rights are:

(a) Adverse action may not be taken except for such cause as will promote the efficiency of the service;

(b) He must be given at least 30 full days advance written notice, identifying the specific proposed action, stating the reasons supporting the proposed action, including names, times and places;

(c) The notice must tell the employee that he has the right to reply, both personally and in writing and to submit affidavits in support of his answer;

(d) Normally he must be retained in an active duty status during the notice period;

(e) Full consideration must be given to his reply and if the decision is to effect the action originally proposed, or some action less severe, he must be given a dated and written notice of the decision promptly after it is reached;

(f) The notice of decision must inform him of the effective date of the action, of his right to appeal the adverse action within the agency and to the Civil Service Commission, and of the time limits and procedures for making the appeals.

(2) *Reduction in Force.* In the event his job is abolished, Mr. Fitzgerald is in Tenure Group I in the Excepted Service and has the right of full application of all reduction-in-force procedures insofar as "bumping" and "retreat" rights within his competitive level grouping. However, since he is the only employee in his competitive level grouping and since he did not progress to this position from other lower grade positions, the net result is that he is in competition only with himself. He could neither "bump" nor displace anyone.

[10] These are the rights involved should charges be preferred or should his position be abolished. There is a third possibility, which could result in Mr. Fitzgerald's departure. This action is not recommended since it is rather underhanded and would probably not be approved by the Civil Service Commission, even though it is legally and procedurally possible. The Air Force could request conversion of this position to the career service, utilizing competitive procedures, and consider all the eligibles from the Executive Inventory and an outside search. Using this competitive procedure, Mr. Fitzgerald might or might not be selected. If not, displacement action would follow.

> When Mr. Fitzgerald was appointed in September 1965 by Assistant Secretary Marks to fill the vacancy created by the departure of Mr. J. Ronald Fox, it was with a mutual understanding that this was to be a Schedule A appointment of two or three years duration. There is nothing in official records to support this understanding. Dr. Flax contacted Mr. Marks by telephone on January 2, 1969, and verified this understanding and reflected the conversation in his memorandum to the Secretary of Defense, a copy of which is attached. We have carefully screened all files and records and can find no formalized confirmation of this understanding."

Mr. Fitzgerald visited the Civil Service Commission on January 10, 1969 to complain of the alleged loss of tenure and his supervisor's statement that his usefulness to the Air Force was at an end. Therefore, Assistant Secretary Nielsen prepared a memorandum for record (M.Ex #7, 1/13/69 attachment). This memo states that Mr. Nielsen reviewed the entire matter of the tenure controversy with Mr. Fitzgerald who stated that he mailed a copy of the first SF-50 to the Committee immediately after the conclusion of the November 13, 1968 hearing and that when the second form was received it was mailed directly to the Proxmire Committee. The memo also states that Mr. Nielsen told the appellant "I felt his actions in this connection had ended his usefulness to the Air Force".

Secretary Seamans testified it was his belief that Mr. Fitzgerald released the SF-50's in the tenure controversy in order to obtain publicity and to place the Air Force in a bad light (TR 430-431, 435-437); that his actions inflamed the situation; exacerbated relations between Mr. Fitzgerald and people in the Secretariat; and "that's when it became much more of a confrontation" (TR 480-481). Secretary Seamans also stated that Mr. Fitzgerald was a celebrity and a controversial person at that time as a result of the press releases concerning the tenure controversy (TR 438-439).

Colonel Pewitt testified that Assistant Secretary Nielsen gave Mr. Fitzgerald the "Lang Memo"; that Mr. Nielsen felt Fitzgerald "had betrayed a personal confidence" by the way the memo was handled; and that Mr. Nielsen lost confidence [11] in the appellant and his usefulness to the Air Force (TR 1991-1992). Colonel Pewitt also stated that he thought Mr. Fitzgerald's days in the Air Force were numbered and that he might be leaving because of the tenure-non tenure publicity and the Lang Memo (TR. 2121-2122).

It is clear that the "Lang Memo" and Secretary Nielsen's declaration that Mr. Fitzgerald had lost his usefulness to the Air Force both stemmed from the Washington Post January 1, 1969 front page article erroneously implying that the appellant lost his career tenure in retaliation for his testimony on the cost overrun in the C-5A project. It is also evident that the Air Force considered Mr. Fitzgerald responsible for this erroneous implication reaching the news media.

Robert C. Seamans, Jr. took office as Secretary of the Air Force on February 15, 1969. Assistant Secretary Nielsen submitted new reorganization proposals to Secretary Seamans on February 26, 1969 (AF-6/25/70, P-292) and May 5, 1969 (M.Ex#11). Prior to submitting the February 26, 1969 reorganization plan, Mr. Nielsen told Secretary Seamans that Mr. Fitzgerald's usefulness to the Air Force was at an end (TR 526-527). Secretary Seamans testified that the February 26, 1969 proposal was similar to the one that Mr. Nielsen had submitted a year earlier except for changing the focal point for

cost analysis capability from Mr. Fitzgerald to Colonel Pewitt (TR 530-531).

Secretary Seamans testified that on or about April 24, 1969 Mr. Fitzgerald was scheduled to give a talk to the American Management Association on the West Coast for the Air Force. He did not meet that committment, apparently because he was giving a series of lectures up at the Capitol (TR 559-561; 570-572). As a result, Assistant Secretary Nielsen had to fulfill this committment in the appellant's place.

On May 5, 1969 Mr. Nielsen submitted his final proposed reorganization plan for SAFFM (M.Ex #11). This plan did not provide for Mr. Fitzgerald's position of Deputy for Management Systems.

On May 7, 1969 Secretary Seamans testified before the House Armed Services Committee in Executive Session and made several accusations against Mr. Fitzgerald. The following quotations dealing with these accusations are taken from pages 2593, 2594 and 2596 of the Committee Hearing report for May 7, 1969 (APP-4/28/71 attachment).

> "Secretary Seamans. I think if you are looking at the record that you should also note where he is spending time off duty as well as on Government time."
>
> Secretary Seamans. . . . I am not saying this is wrong, mind you, but he is working with a group of staff people up on the Hill, among them Congressman Moorhead's chief of staff. He [12] was scheduled to go and make a speech on the west coast, which I approved. He wanted to make the speech. I said go ahead. And then he backed out of it at the last minute because he was so busy up here doing his extracurricular work. We had difficulty filling the speaking assignment."
> "Mr. Stratton. Mr. Fitzgerald is up there now, and has been for the last several weeks, as I understand it.
>
> Secretary Seamans. I'm not familiar with detail. I do know there is a group that engages in a so-called seminar. It may be perfectly appropriate, but it is not

official Air Force business. It is nothing that has been scheduled with a committee through the Secretary of the Air Force or any other responsible Air Force official."

"Secretary Seamans. In my conversation, a little earlier, I was talking about some of the reports that came out of the Holifield committee, some of which are confidential, that as indicated by Congressman Moorhead, he received from Mr. Fitzgerald.

Mr. Hunt. Did Mr. Fitzgerald have the permission of the Air Force to release that information?

Secretary Seamans. He certainly did not.

Mr. Hunt. What is being done about Mr. Fitzgerald, then?

Secretary Seamans. I'm reviewing the case.

Mr. Hunt. Will you advise us what you are doing with the case when you are finished?

Secretary Seamans. I certainly will."

In addition, the following exchange took place between the Chairman of the Committee and Secretary Seamans:

The Chairman. Is he still on the Air Force payroll?

Secretary Seamans. He is still on the Air Force payroll, he works in the Financial Management Office.

The Chairman. If I had a fellow like that in my office, he would have been long gone. You don't need to be afraid about firing him."

[13] Secretary Seamans testified at the Commission's hearing that he was not fully satisfied with Mr. Fitzgerald's performance; that he (Fitzgerald) was not taking his responsibilities to the Air Force seriously enough (TR 868-869); that he was not fulfilling his duties (TR 872-874); and that he (Seamans) had stated to the Committee on May 7, 1969 that Mr. Fitzgerald had leaked confidential documents (TR 882). Sec-

retary Seamans testified that on the day after his May 7, 1969 testimony he learned that no security violation was involved (TR 636); that the word "confidential" did leave an ambiguity (TR 637); that some damage was done (TR 637); and that it wasn't until six months later that he apologized to the Committee for his remarks being interpreted as a security violation (TR 617, 637, 892).

Brigadier General Joseph J. Cappucci, former Director of the Air Force Office of Special Investigations (OSI), testified that on May 17, 1969 OSI opened a file, HDQ 24P-12052 and started a special inquiry based on conflict of interest charges made against Mr. Fitzgerald by a confidential informant. Subsequently three (3) more people volunteered information in June and July (TR 48-49). A number of checks were made (TR 61-62) to test the substance of the allegations. These were in Washington, D.C.; in New York, (TR 64); Boston, (TR 70); and in Los Angeles to interview Leonard Marks (TR 83-85). All the checks came back favorable (TR 111, 119) but this favorable information was not placed in the file (TR 111).

General Cappucci testified that when these checks came back favorable, instead of placing the favorable information in the file he closed it and was going to destroy the file when it was impounded (TR 112-113). All the favorable reports were destroyed (TR 115, 120).

We find no credible explanation for OSI retaining the derogatory allegations about Mr. Fitzgerald while destroying all of the results of the investigation which proved that these allegations were without substance. General Cappucci went to great lengths to try and distinguish between a "Special Inquiry" and an "Investigation". However, it was a fruitless exercise in semantics in this case.

General Cappucci also testified that the June 24, 1969 memorandum report of interview with Leonard Marks (Justice File P-95), which clearly showed that there was no substance to the conflict of interest allegations, was not in the OSI file when he sent it to "The Hill" (TR 157-162). We find it unconscionable for OSI to have shown only the derogatory allegations without also showing the results of the investigation which

laid to rest these allegations. We can only view this as an attempt to justify Mr. Fitzgerald's separation.

General Cappucci testified that he was not directed by anyone to open the special inquiry on Mr. Fitzgerald; that he did not disclose the fact that the inquiry was opened or the facts of that inquiry, to Secretary Seamans, Assistant Secretary Nielsen, Assistant Secretary Schedler or anyone else in the Executive Branch of the Government outside the OSI prior to November 4, 1969 (TR 198). General Cappucci also testified that Secretary Seamans first learned of the existance of the OSI file when the General gave the Secretary a few minute briefing on November 17 or 18 [1969], the day before he testified before the Proxmire Committee (TR 154-155).

[14] In his testimony before the Proxmire Committee on November 17, 1969, in discussing the reorganization of the SAFFM Office and Mr. Fitzgerald's resultant RIF, Secretary Seamans stated that he and Mr. Laird the Secretary of Defense made an effort for many months to find a way to use Mr. Fitzgerald in some other capacity; that they talked to him personally; and considered him for other positions in the Department of Defense but did not find a suitable solution (APP-2/9/71, Attachment 1, P 102-103).

Secretary Seamans testified that he first gave consideration to finding another job for Fitzgerald outside the Air Force about the middle of May. This was shortly after he learned that the appellant had transmitted documents to Congress and learned the appellant had not fulfilled his committment to deliver the West Coast address (TR 707-708). Secretary Seamans believed that a job for Mr. Fitzgerald in DOD would be uncluttered by some of the unfortunate relationships that had arisen in the Air Force (TR 708).

Mr. Fitzgerald testified that he met with Secretary of Defense Melvin Laird on June 11, 1969; that the Secretary was very friendly but told the appellant that he had become a personnel problem in the Air Force, which the appellant conceded was probably true; and that he would have to go someplace else. They discussed what might be done in other areas of DOD (TR 2866-2871).

One of the positions under consideration was an assignment on the staff of the Fitzhugh DOD Blue Ribbon Panel (TR 714-723, 2872). Mr. Fitzgerald had meetings with Mr. Fitzhugh and Mr. Buzzard, the Staff Director, and then submitted an August 25, 1969 memo to these men (AF-6/25/70, P-118) which stated in part:

> "On the second point, I am not the only action-oriented cost cutter now excluded from the business. Aside from publicity, my situation is unique only in that I have not gone away quietly as have most others of my experience and bent."

After receipt of this memo Mr. Fitzhugh informed Secretary Seamans that he was not going to recommend Mr. Fitzgerald for assignment to the staff (TR 728). Secretary Seamans properly considered the above quoted statement to be a fairly inflammatory kind of statement to put into a memo related to consideration for another position (TR 729-31). The Secretary considered that Mr. Fitzgerald had a chip on his shoulder (TR 729-731). It is clear that Mr. Fitzgerald was not interested in a position on the Fitzhugh Panel as evidenced by the tenor of his August 25, 1969 memo.

Spencer J. Schedler replaced Thomas Nielsen as Assistant Secretary of the Air Force for Financial Management on June 24, 1969. Mr. Schedler testified that [15] he saw the "Lang Memo" in the summer of 1969. He testified that he considered Mr. Fitzgerald's performance deficient in regard to the instances of the preparation of a "Should Cost Primer" and his failure to have prepared a demonstration guide (TR 1683-1694). Mr. Schedler testified that he first decided to abolish Mr. Fitzgerald's position in late September or early October 1969 when it became evident to him that as a result of the Project 703 cutbacks he would not be able to add spaces to the SAFFM office to improve its analytical capability (TR 1791-1792).

On November 3, 1969 Mr. Schedler submitted a form 52 request to abolish Mr. Fitzgerald's position by reorganization. This request was approved by Secretary Seamans on the same day. Thereafter, by letter dated November 4, 1969, Mr.

Fitzgerald was notified of his proposed separation by reduction-in-force which was effected on January 5, 1970.

On November 17 and 18, 1969 the Proxmire Committee held hearings on Mr. Fitzgerald's proposed termination by RIF.

Secretary Seamans testified at the Commission's hearing that between November 4 and 18, 1969 the date of his appearance at the Committee hearing he saw and/or communicated with Republican Senators Jordan and Percy and Republican Congressmen Brown and Conable concerning Mr. Fitzgerald's RIF (TR 777-778, 857-858, 860). The Secretary admitted mentioning to Senator Percy that Mr. Fitzgerald was not a team player (TR 782) and that there had been difficulties in the relationship between Fitzgerald and the Air Force (TR 780). Secretary Seamans also told Senator Jordan of these relationship difficulties; however, he denied that they were the reason for the RIF; and he did not recall using the term "team player".

On May 7, 1973 former Senator Jordan was sent several written interrogatories. His written replies were received May 19, 1973. In answer to one question Mr. Jordan recalled Secretary Seamans stating Mr. Fitzgerald was a troublemaker, that he was not a team player and that he was terminated for economy reasons under a reduction in force designation.

In view of the above and the fact that Secretary Seamans did mention the team player situation to Senator Percy, we must conclude that he also used that term in talking to Senator Jordan.

Assistant Secretary Schedler testified that during the same period of time he visited Republican Senators Mundt and Murphy and Republican Congressmen Broyhill, Buchanan, Conable, Dickinson and Rhodes to explain Mr. Fitzgerald's RIF (TR 1377).

There is a conflict in the evidence as to whether or not Assistant Secretary Schedler told Congressman Dickinson that Mr. Fitzgerald was not a team player. Congressman Dickinson testified (TR 2285) that at their November 11, 1969 meeting

Mr. Schedler used the term "not a team player" and the Congressman confirmed the accuracy of a November 19, 1969 newspaper article quoting him as saying that Mr. Schedler told him Mr. Fitzgerald was not a team player (APP-2/9/71, Attachment #1, P 202-203).

[16] Michael L. Lehrman, a former fellow classmate of Mr. Schedler at Harvard, testified that he met Mr. Schedler at an Air Force Association Convention in September 1970. Mr. Lehrman testified that at this meeting Mr. Schedler made uncomplimenting remarks about Mr. Fitzgerald, stated that he was "a pain in the ass" and was not a "team player" (TR 2885-2896).

From all of the above we must conclude that Mr. Schedler did tell Congressman Dickinson that Mr. Fitzgerald was not a team player, or used words to that effect.

After carefully reviewing the complete appellate record we find the evidence of record does not support the appellant's allegation that his position was abolished and that he was separated by RIF in retaliation for his having revealed the C-5A cost overrun in testimony before the Proxmire Committee on November 13, 1968.

In summary, the record reflects that the C-5A contract was negotiated during a Democratic Administration. Secretary Seamans and Assistant Secretary Schedler were not in office at the time the contract was negotiated or at the time of Mr. Fitzgerald's testimony, before the Proxmire Committee on November 13, 1968. In fact, Secretary Seamans did not take office until February 1969 and Assistant Secretary Schedler not until June 1969, three (3) and seven (7) months later respectively; and under a Republican Administration.

Secretary Seamans agreed that there was a large cost overrun on the C-5A project and that Mr. Fitzgerald was acting properly in testifying after being called by the Committee. In addition, a number of witnesses agreed with Mr. Fitzgerald's estimate of the possible magnitude of the overrun.

As we have previously found, and as the Air Force knew, Mr. Fitzgerald was not entitled to career tenure. The Civil

Service Commission had not been requested nor had it granted prior approval to the Air Force to convert Mr. Fitzgerald from the Excepted to the Competitive Service. The September 6, 1968 SF-50 was erroneously issued, obviously due to a computer error, and was properly corrected by the November 25, 1968 SF-50 to show that Mr. Fitzgerald was converted from "Excepted-Conditional to "Excepted" upon completion of three years of service, effective September 20, 1968.

The Lang Memo of January 6, 1969 and Assistant Secretary Nielsen's January 8, 1969 comment to Mr. Fitzgerald, which Mr. Nielsen made the subject of a memo for record on January 13, 1969, that his usefulness of the Air Force had come to an end did not stem from his testimony before Congress on November 13, 1968. These two pronouncements resulted directly from the January 1, 1969 Washington Post front-page story that carried a clear but erroneous implication that Mr. Fitzgerald's career tenure had been revoked in retaliation for his November 13, 1968 testimony. Secretary Seamans, and others in the Air Force considered Mr. Fitzgerald to be a publicity seeker; that the appellant was [17] directly or indirectly responsible for the erroneous January 1, 1969 Washington Post story; and that Mr. Fitzgerald had done this for the purpose of placing the Air Force in a bad light.

We find that the unjust publicity the Air Force received concerning this tenure controversy, which it considered Mr. Fitzgerald to be basically responsible for, was the prime factor in the deterioration of relationships and development of an adversary environment between Mr. Fitzgerald and the Air Force.

We note that Mr. Fitzgerald received his appointment in September 1965 during a Democratic Administration, and in his own words the appointment was to be for only a few years. Mr. Fitzgerald's position carried with it the qualifications requirement that he "be personally acceptable to the Assistant Secretary of the Air Force (Financial Management)" (A-6/25/70, P-145). By the end of December 1968 the appellant's "few years" had gone by; a Republican Administration would

soon be coming into office; and thus it appeared that Mr. Fitzgerald could possibly soon be leaving.

While Mr. Fitzgerald has denied that he was "Senator Proxmier's boy in the Air Force", and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that. The statements that he was not a "team player" and "not on the Air Force team" go directly to that point. We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for the appellant.

It is also clear that probably by January 1969, and certainly no later than May 1969, Mr. Fitzgerald had achieved controversial status and was an Air Force personnel problem as his testimony concerning his meeting with Secretary of Defense Melvin Laird revealed.

Assistant Secretary Nielsen considered Mr. Fitzgerald's usefulness to the Air Force to be at an end as of January 8, 1969. Therefore, he obviously did not include Mr. Fitzgerald in his proposed reorganizations of February 26, 1969 and May 5, 1969. Mr. Nielsen's last proposal is essentially the same as the reorganization Assistant Secretary Schedler, with Secretary Seaman's approval, finally put into effect. This reorganization abolished Mr. Fitzgerald's position and led to his separation by RIF on January 5, 1970.

Mr. Schedler testified that he did not decide to abolish Mr. Fitzgerald's position until late September or early October 1969. However, Secretary Seamans and Secretary Laird came to the decision that Mr. Fitzgerald had to leave the Air Force much earlier than Mr. Schedler was willing to admit. They were busy looking for another position outside the Air Force for the appellant as early as May 1969. One of the positions under consideration was with the Fitzhugh Blue Ribbon Panel, previously discussed.

[18] Secretary Seamans denied being instructed, directed or ordered by anyone to terminate Mr. Fitzgerald. However, he

initially declined to respond to any and all questions concerning possible communications he may have had with, or any advice received from, the White House staff regarding Mr. Fitzgerald. This declination was based on the doctrines of Executive Privilege and privileged communications. Secretary Seamans was advised by this examiner (TR 499) as follows:

> "Mr. Secretary, I am without authority to order you to answer the question. If the answer to the question becomes relevant and material, all I can do is to take into consideration your refusal to answer the question."

Secretary Seamans subsequently testified that at some point in time prior to Mr. Fitzgerald's job being abolished he did receive some advice from the White House; however, he refused to discuss it any further (TR 839).

By letter dated August 2, 1973, with a copy to the agency representative, appellant's attorney submitted a copy of a January 20, 1970 internal White House memo from Alexander Butterfield to Mr. H. R. Haldeman that had just been discovered. The agency was offered but declined the opportunity to comment. This memo states:

> "You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again—partly for the record—and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.
>
> —Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.
>
> —Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's "shoddy purchasing practices".

> Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military Services are, they very definitely do not go out of their way to waste government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new ways to economize. If McNamara did nothing else he made the Services more cost-conscious and introspective—so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.
>
> [19]—Upon leaving the Pentagon—on his last official duty—he announced to the press that "contrary to recent newspaper reports" he was not going to work for the Federal Government, but instead, was going to "work on the outside" as a private consultant.
>
> We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.
>
> We owe "first choice on Fitzgerald" to Proxmire and others who tried so hard to make him a hero."

The information contained in the memo concerning Mr. Fitzgerald's May 1969 statements at a meeting of the National Democratic Coalition had not previously come to light in this proceeding. In the light of Secretary Seaman's refusal to furnish testimony on conversations he had with, or advice he received from the White House Staff; and our notification to the Secretary (TR 499), quoted supra, we must conclude and do hereby find that Mr. Fitzgerald's May 1969 statements were the subject of Secretary Seaman's discussion with the White House staff. We must also conclude and do hereby find that these statements by Mr. Fitzgerald were one of the underlying reasons for the decision to abolish Mr. Fitzgerald's position and to terminate his employment with the Air Force.

The "Lang Memo" previously quoted, set out three (3) methods by which the agency could terminate Mr. Fitzgerald.

Method No. 3. was not recommended. Method No. 1. was to follow adverse action procedures with all of the requirements for specified charges, opportunity to reply and appeals. Method No. 2., which the agency subsequently followed, was to abolish Mr. Fitzgerald's position and since his assignment rights would only be to Excepted Service positions, he would end up being separated. Secretary Seamans and Assistant Secretary Schedler both saw the "Lang Memo" prior to Mr. Fitzgerald's position being abolished.

Our findings, supra, reveal many instances of dissatisfaction with Mr. Fitzgerald. In addition, Secretary Seamans testified (TR 964) that:

> "It is obvious from the testimony these past three days that I was not satisfied with Mr. Fitzgerald's performance. I made no pretense that I was."

After carefully reviewing the complete appellate record and in view of all of the foregoing analysis, findings and conclusions, we find that the agency's decision to abolish Mr. Fitzgerald's position and to include him in the Project 703 reduction-in-force improperly resulted from and was influenced [20] by reasons purely personal to the appellant; and was for the purpose of terminating his employment with the Air Force.

Secretary Seamans, in discussing his dissatisfaction with Mr. Fitzgerald also stated (TR 964):

> "But at the same time it does not give Mr. Fitzgerald immunity against having his job abolished, and the abolition of the job for improvement in our management capability was a separate and distinct step, or action."

It is true that an undesirable, inadequate or unsatisfactory employee is not immune from having his position abolished. However, the decision to abolish that employee's, or any employee's, position must be based solely on reasons not personal to the employee. These employees must be removed from their positions by other means because the spirit, intent, and letter of the Commission's regulations require that the reduction-in-force system be used for reasons that are not

personal to the employees affected. The more an employee is deserving of being fired, the more inappropriate it is to abolish his position and separate him by reduction-in-force.

In the case at hand, where we have found from the evidence of record that the decision to abolish Mr. Fitzgerald's position and to separate him by reduction-in-force was influenced by, and resulted from, reasons that were personal to the appellant; and where the appellant was an employee entitled to the adverse action procedures set forth in Part 752-B of the Civil Service regulations; we find his separation by reduction-in-force to be improper, inappropriate and contrary to the spirit, intent, and letter of the Commission's regulations.

RECOMMENDATION

Accordingly, we recommend that Mr. Fitzgerald be restored retroactively to January 5, 1970 to the position from which he was improperly separated, or to any other position of like grade, salary and tenure in the Excepted Service and with the same or similar qualifications requirements as his former position. Please furnish this office with a copy of the SF-50 accomplishing the recommended corrective action.

The appellant requested an award of damages, costs and reasonable attorneys' fees. The applicable statutes, Executive Orders and Commission regulations do not provide for any awards of damages, costs, or attorneys' fees by the Commission in a decision on an appeal. Therefore, the appellant's request in this regard must be denied. It should be noted that during the course of the proceeding the appellant's attorneys contended that they had volunteered their services and were performing without charge.

[21] The appellant has also requested reimbursement for the compensation he would have received if he had not been terminated.

Retroactive corrective action as ordered by the Commission carries with it an entitlement to back pay in accordance with the provisions of the "Back Pay Act". However, the

Commission does not determine the amount of the back pay entitlement, if any.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U.S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U.S. Civil Service Commission
Washington, D.C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

/s/ Herman D. Staiman

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Herman D. Staiman, Chief
Appeals Examining Office

Excerpts From The Deposition of Patrick J. Buchanan (R. 414) [pp. 14-19, 41-50]

[14] Q. Do you have any recollection of communicating with the President anything having to do with Fitzgerald before November or December of 1969? A. No.

Q. Now, focusing in on November and December of '69, what recollection do you have concerning being aware of Mr. Fitzgerald and any situation that arose with him and his employment at the Department of Defense? A. Well, Fitzgerald, I have to assume from what we did, had become a public issue. Clark Mollenhoff—his departure from the Department of Defense or whatever it was—anyhow, Clark Mollenhoff came down to my office.

I had sent out a memorandum to the Department of Defense asking for responses to questions which were going to —likely to come up at a Presidential press conference about A. Ernest Fitzgerald, and they sent back a response or a number of responses which I then collated and got together and made into a single answer.

At the same time, Clark Mollenhoff came down to my office and talked to me about the matter, and I sent a subsequent—which I have seen subsequently since then—I sent a memorandum to the President suggesting that he handle the [15]question, if it came up, in an altogether different way.

Q. Now, the memos you say you have seen since then, was that memo included among the memos that I showed you this morning before this deposition? A. Yes, I believe it was.

Q. I am having those xeroxed, and as soon as they're done they'll be in here and we'll go through them. I'm going to try to cover the general turf to save time. A. Before I saw the memo, if somebody had asked me before I'd seen the memo I sent, I would say Mollenhoff and I sought to get the Administration to find Fitzgerald a new job at equal pay and to make some sort of

commendatory statement about the job he had done on the cost overruns of the C-5A, because I remember working with Clark Mollenhoff on the issue in the White House, and that was before I saw the memoranda.

Q. Now, what was the tenure of the position taken by Mr. Mollenhoff concerning the pros or cons or the Fitzgerald situation vis-a-vis the wisdom of the White House backing Fitzgerald versus the Department of Defense?

MR. KEENEY: Objection as to the form.

THE WITNESS: Pardon?

MR. KEENEY: Objection as to form.

[16] BY MR. MORTENSON:

Q. He's registering his objection. A. What was Mollenhoff's position?

Q. Yes, what was the tenure concerning the Fitzgerald situation? A. My recollection is this: Mollenhoff had looked into the situation much more closely than I had. I had not. And Mollenhoff came to me and said and indicated that what we had here was a bureaucratic battle over at Defense, that Fitzgerald was being canned because of his battle. There was a certain institutional loyalty over there to—that Fitzgerald had been an embarrassment, and now the issue had been made public. And now the Nixon Administration, in particular the White House, were being blamed for this thing and that the President had a golden opportunity at the press conference not only to correct a seeming injustice, but also for us to take—to get political credit for doing what we ought to have done.

Fitzgerald had been no embarrassment to us, the C-5A was under the Johnson Administration, so that's precisely the position we recommended to Mr. Nixon.

Q. Now, in your communications with Mr. Mollenhoff, did [17] he at any time ever use any words to the effect—communicating to you the impression that the White House's position with regard to Mr. Fitzgerald involved a criminal conspiracy of any sorts, a cover-up?

MR. KEENEY: Objection, leading question.

MR. MORTENSON: Let me finish.

BY MR. MORTENSON:

Q. —a cover-up, an obstruction of justice or a retaliation of a witness before Congress?

MR. KEENEY: Same objection; leading question.

THE WITNESS: As for the—no, I mean, I have never —and I know Clark Mollenhoff well, and certainly not in 1969 there was no conceivable idea that there was anything criminal involved.

Some individual had been fired over at Defense or removed and it had become an embarrassment to the Administration, and we, in the White House, were catching blame. And it seemed to be something that was really not our problem; it was their problem over there.

And even in '73 and I know Clark Mollenhoff well—and he called me and used to talk to me a good deal, even during the Watergate days when he was outside. But he never [18] to my recollection in the matter of Mr. Fitzgerald ever used the term or suggested something had been done that was criminal.

I mean, if you ask me did Mollenhoff suggest that the matter had been badly screwed up, I would say yes, but the idea that anything illegal had taken place or we were involved in something illegal, no.

Q. Now, did you communicate in some way or another your views and/or the views of Mr. Mollenhoff to the President? A. Oh, yes. Mollenhoff came down to me and I sent a memorandum to the President as part of his briefing book, giving a suggested response which contradicted or which was at odds, you might say, with what the official response from the Department of Defense was.

I felt the White House should take a stand, in other words, should overrule the Department of Defense and the President should himself overrule and should get credit for overruling the Department of Defense on the whole matter of Mr. Fitzgerald

by, as I think I suggested, removing him from the shop he was in. Obviously there was bad blood there. As I say, making some commendatory statement about the job he had done and finding him a new and comparable position.

[19] In other words, the notion that in those days whistleblowers were very much in vogue and the very fact that Mr. Nixon, the President, had not only commended one, but had either promoted him or given him a job of comparable responsibility would have made the Nixon Administration and the President look good; and it was the right thing to do; and it would have been a benefit and the only one whose noses would have been out of joint would have been these people over there, nameless, faceless individuals over there who apparently had something against Mr. Fitzgerald because of what he reported on the C-5A.

But let me say in terms of who's involved in the Department of Defense and what condition Mr. Fitzgerald was in and whether these were bureaucratees he was involved in, I don't know. I relied on Mollenhoff for that.

Q. Now, with regard to the briefing books, did you, after the press conferences, as a matter of course get the briefing books back into your possession at some time? A. Right, it came a time, I forget exactly when during the Nixon Administration, when Nixon directed that all the briefing books be sent back to me, and I had a file cabinet which contained all the briefing books. And there was a

* * *

[41] date of this, because the—no, wait a minute. This is consistent because we're still asking for information on the Fitzgerald matter, I think, in that earlier memo.

This appears to be the Department of Defense's responses which I told Haldeman which would be coming in book number II, which I used as the basis for the Department of Defense response, to to speak, to the Fitzgerald question.

Can I take a look at that first one again? Where is the—have you already given me or do we have a—no, we don't. Okay.

Anything else?

Q. Let me move to Defendant's 107(n). (The potocopied document titled A. Ernest Fitzgerald, one page, was marked for identification as Defendant's Exhibit 107(n) and is attached to the court copy of this deposition.) THE WITNESS: Okay.

BY MR. MORTENSON:

Q. Before I ask you any questions on it, let me also place before you 108(n). [The photocopied document titled A. Ernest Fitzgerald, coded F-1 at the bottom, was marked for identification as Defendant's Exhibit 108(n) and is attached to the court copy of this deposition.]

[42] BY MR. MORTENSON:

Q. Let me represent to you that I don't personally know the source of the location of this document, and so I'm going to ask you blindly, do you recognize this document, what the date of it would have been or is or anything about it? A. This appears to be the answer, requested answer to the A. Ernest Fitzgerald question which I would have prepared based on the materials sent to me by Colonel Bolt.

In other words, I would never send Nixon five straight questions on A. Ernest Fitzgerald; I would take all the material, put it into one question.

Probably the ink coloring on the first one, 107(n) is probably mine to indicate that from the materials Defense sent me that Nixon should emphasize the point that the revelations dealt with McNamara, not Laird.

108(n) seems to inciate—these are Nixon's speeches I believe, but you can check those from the briefing book, after Nixon returned it.

This looks like, as I say, the question as it was sent to Nixon. This looks like the question after Nixon had—makes his own markings and as I say, makes a number of [43] markings. That looks like the first response that Nixon gave.

Now, have we got—

Q. Let me, while you're—then show you the next document, 109(n). [The photocopied document, one page, dated

December 8, 1969 Memorandum to the President from Patrick J. Buchanan was marked for identification as Defendant's Exhibit 109(n) and is attached to the court copy of this deposition.]

MR. RAVEN-HANSEN: For the record, this has also been previously marked. I think it was Plaintiff's Exhibit 106 marked during Mr. Mixon's deposition.

BY MR. MORTENSON:

Q. If you can look at this and tell me whether you can identify it and whether it puts in context the documents I gave you just before it? A. All right, okay. Now, this is what it seems to be: We sent the old man a memo on the Fitzgerald matter. I sent my memorandum to him suggesting what he say.

In comes the Defense Department stuff. This is the December 8th did you say was the date of the press conference?

[44] Q. Yes.

MR. KEENEY: Yes.

THE WITNESS: We let the President know what Defense has said in effect, but we disagree with Defense's position and we reiterate that we disagree with that position and from a public relations standpoint, is the term used here, we suggest, once again, that the President handle the question if it comes up in the way that we had recommended and that we should just tell Secretary Laird that if he has to see it that's what we're going to do.

BY MR. MORTENSON:

Q. Let me show you the next document, which is Defendant's Exhibit 110(n). [The photocopied document, one page, on White House letterhead dated December 5, 1969, Memorandum for H. R. Haldeman was marked for identification as Defendant's Exhibit 110(n) and is attached to the court copy of this deposition.]

BY MR. MORTENSON:

Q. Do you recognize the— A. The scrawl?

Q. —handwriting? [45] A. Yes, that clearly seems to be Mr. Nixon's handwriting. These are the additions to the—this

is, yes, this is one addition to the briefing book, right, that's Mr. Nixon's writing, "Fitzgerald reinstated".

It appears that he's, he is, if you take a look at the memorandum attached, the underlining could be that of Mr. Nixon himself because it appears to be done in his pen, when he says "direct" that appears to be Mr. Nixon's underlining, as I say.

It seems to me that he has taken our counsel because A, he has underlined the word "direct" which he would do, "I have decided to direct—", and then he has said, "Fitzgerald reinstated" on the cover of the—on the memorandum, which is in his briefing book. So he seems to be prepared to say at the press conference that Mr. Fitzgerald has been reinstated or something to that effect.

It seems like we had won the battle, in other words.

Q. Now, when you say that, that it seems that that's what he has done, do you base that solely upon the language that is stated there, or is there built into that interpretation your experience in dealing with him in the White House prior? [46] A. Yes, as I mentioned, if you get something like—a note like this, you can go through his briefing books and he will outline or note precisely what he's going to say. If you go through the briefing books and then compare those with the transcript of the press conference itself, you can see Nixon making each of these points that are written right there in the briefing book.

The very fact that I believe this is his underlining of the word "direct" that came out of the briefing book, it can only be his underlining, because he and I are the only ones that dealt with the briefing book itself, and if I had underlined it, it would be on my typewriting. So he had underlined the word "direct" and his writing is on the cover.

"Churchill quotes." He probably sought to ask me for some Churchill quote for some other question which he would like to have included in his response. My guess is it's not to the Ernest Fitzgerald matter. I don't think he was going to compare him with Churchill.

(Laughter.)

MR. RAVEN-HANSEN: Off the record.

(Discussion held off the record.)

[47] BY MR. MORTENSON:

Q. While we're going through documents, let me show you this next one that's in front of me, which would be Defendant's 111(n). [The photocopied document, two pages stapled, on White House letterhead dated January 21, 1970 marked "Confidential" was marked for identification as Defendant's Exhibit 111(n) and is attached to the court copy of this deposition.]

BY MR. MORTENSON:

Q. Do you recall, Mr. Buchanan, ever seeing this document before? A. As recollection, no, I don't.

Is this a two-page job? No.

Q. Let me place in front of you 112(n). [The photocopied document, two pages stapled, on White House letterhead dated December 5, 1969, Memorandum for the President from Clark Mollenhoff Subject: The Fitzgerald Case was marked for identification as Defendant's Exhibit 112(n) for identification and is attached to the court copy of this deposition.]

[48] BY MR. MORTENSON:

Q. Let me ask, do you recall this being a document that I showed you this morning before the deposition began? A Yes, I do. This, again, looks like—let me see. Again, looks like Mr. Nixon's handwriting on page 2, and also his form of underlining on page 1 with his pen.

Let me see. Let me read this. Obviously, he's not going to issue, you know, a major statement from the White House.

It's got to be a suggested position with regard to the upcoming press conference. It appears to be that. He looked at—maybe what this looks like is I had this put in my briefing books, you know.

Q. The "briefing book this afternoon" is the handwriting you're reading, of the handwriting in the right-hand column on page 2 of the document? A. Right.

Q. Is that the handwriting which you attribute to President Nixon on— A. Right, not only the handwriting, but the underlining as well. Let's see.

The very fact that he would circle something like [49] that would mean that this is the part of the memo that he wants stuck in his mind.

Q. Mr. Buchanan, why are you capable to identify Mr. Nixon's handwriting? A. Because I've seen—I've worked with him for eight and a half years. I worked with Mr. Nixon for eight and a half years. His scribblings—I have got personal letters from him in my library. If you go through the files of the Presidential briefing books you'll find Nixon's handwriting all over them.

You can compare the two, because as I say, once the briefing book itself went from me, the only one who had it was Richard Nixon. It went directly into him. It did not go to—the first copy—that copy did not go to anyone else; a xeroxed copy of the books would go to the different individuals.

Q. Give that to her again. A. The briefing book would go straight to the President. I would either have it on his night table or have it delivered down to him personally when he wanted it. He would get the book himself just like he would get the original news summary, and others, Ziegler, Erlichman, Harlow, would [50] get clean xeroxed copies.

So the only one that would have written on the briefing book would be Richard Nixon.

Q. You said that you traveled with Mr. Laird and you know him well and know him well today; is that correct? A. Yes, I know Mr. Laird.

Q. And you worked with Mr. Nixon, you said, for approximately eight and a half years? A. Right, I was with him since January '66 and was his only assistant, I think, for fourteen months.

Q. Do you, of your own personel knowledge, know whether Mr. Nixon ever directed, at any time, any time member of his staff to see to it that Mr. Fitzgerald was placed in

a position in the Bureau of the Budget? A. I don't have any knowledge of that, no.

Q. All right. Now, based upon your knowledge of Mr. Laird and Mr. Nixon, if Mr. Nixon directed that Mr. Fitzgerald be placed in a position in the Bureau of the Budget, do you know whether that would be consistent or inconsistent with the relationship between Mr. Nixon and Mr. Laird in terms of Mr. Nixon's unwillingness to override or to direct Mr. Laird in personnel matters at the DOD?

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Excerpts From The
Deposition of Alexander P. Butterfield (R. 42)
[pp. 127-28, 130, 143-44, 147-48]

[127] A. No, it was not. But as I said, my duties were not specific, but any member of the White House staff could be asked anything to do, almost anything. The scope of one's duties, I think, were surprisingly broad.

Q. Yes.

Now, isn't it a fact, sir, that when you wrote this memorandum you were outside of your field of authority entirely?

MR. KELSON: I object to the question.

THE WITNESS: I would say not at all.

MR. BODNER: (Resuming)

Q. Not at all? A. Not at all.

Q. You're saying now that when you wrote this memorandum you were not acting out of your field entirely?

MR. KELSON: Entirely?

MR. BODNER: Yes.

MR. KELSON: I object to the question again.

MR. BODNER: (Resuming)

Q. Is that right? A. I would say no field was outside of my authority. I don't say that by way of making my job sound important, but I dealt in so many different areas—I couldn't begin to name them. I attended to so many separate functions. I was [128] a senior official on the White House staff, a designated member of the senior staff, and I don't believe that any subject, especially one which was of interest to any of my superiors—Mr. Haldeman, the President or anyone else—was outside the realm of my authority.

Q. Did you ever tell anyone at any time that when you wrote that memorandum it wasn't your your role at all? A. It wasn't my role to write this? I don't recall if I did, and if I did I certainly was in error. I don't recall telling anyone.

Q. Is that an untruth if you said it? A. It wasn't an untruth. It wasn't an intentional untruth. It was either an error on the person's part with regard to interpretation—

Q. Do you deny saying it? A. I know not to deny saying anything. During my 38 hours of interrogation on this Watergate business, I've learned never to be positive about anything I've done. So if I said it, it was wholly false.

Q. Would it also be false if you said that when you wrote that memorandum you were out of that field entirely? A. That would be wholly false if I said that. You see, nothing was out of my field.

* * *

[130] Q. Was it part of your official duties to write this memorandum? A. Very definitely, very definitely.

Q. Did anybody— A. It was part of my official duties to express my opinion on a subject of interest to any of my superiors or any of my colleagues. But this particular memorandum, as I'm sure you see, was prompted by an enquiry from the press office.

Q. Yes, sir. A. Otherwise, it probably would not have been written.

Q. You weren't working for anyone in the press office? A. No, I was not.

Q. The only person you were working for was Mr. Haldeman before the change, and then the President of the United States, Richard Nixon? A. That's correct; and always for Mr. Haldeman.

Q. Yes, sir. A. And any senior member of the White House staff. I felt that I worked sort of indirectly for Ehrlichman, Kissinger and others if they were to task me with some chore.

Q. But you weren't working for Alan Woods, were you? A. No, but Alan Woods enquired as to, if I may refer to the memorandum and as I say I had not read this memorandum

* * *

[143] never had the responsibility, did you, sir, for determining whether persons such as Mr. Fitzgerald in the Air Force should remain in his position or be terminated from his position, is that right?

THE WITNESS: I never had a responsibility for determining whether or not Mr. Fitzgerald should remain with the Department of the Air Force. That is correct.

MR. BODNER: (Resuming)

Q. Yes, sir. But you did write this memorandum expressing the view, as you stated it in the memorandum of July 20th, 1970—January 20th, 1970, that "He should bleed for a while", is that right, sir? A. I wrote this memorandum of January 20, 1970, entirely on my own, feeling it my duty to express, again in writing—I had already mentioned it once to Mr. Haldeman orally earlier, and I can't remember on what occasion I did that. I probably wouldn't have expressed it in writing at all if I hadn't been prompted by Mr. Woods' enquiry of an Administration position; and I wrote it entirely on my own. And the expression "let him bleed" as I'm sure everyone knows, is in retrospect, a very poor choice of words; but it is expressive of what I meant—let him cry, let him suffer, for at least a while. And that is precisely what I did mean. [144] As I said before, I am not at all ashamed of this memorandum. It is what I thought at the time based on the information that I got from that one meeting with Mr. Haldeman and others sometime before, some few weeks before.

Q. And you not only wrote that memorandum to Mr. Haldeman, but you sent it to six of the most important members of the White House staff. Isn't that true, sir? A. That is true, all of whom would be giving Mr. Haldeman inputs or all of whom had something to do with the development of an Administration position on a subject of this nature; and I would be remiss, I think, if I did not let them know what I knew—also my opinion—so they could either elaborate on what I knew or contradict what I knew so that Mr. Haldeman could get the benefit of everyone's views on the subject if he had the responsibility for developing a position or being the final authority with regard to establishing a position or recommending a position to the President.

Q. And you knew, did you not, sir, that Mr. Fitzgerald's job and future career in the Air Force was at stake?

MR. KELSON: Objection. That question is misstating facts previously in the record.

MR. BODNER: Come on. Your objection is noted.

* * *

[147] not be done.

A. For a while, at least.

Q. Yes, sir. A. Yes, I certainly would admit to that.

Q. As you expressed it in the memorandum, you thought "He should bleed for a while" or suffer for a while, because in your view he had done something improper when he was with the Air Force? A. That is correct.

Q. And as I read your memorandum, you believed that he had acted outside of channels. Is that right? A. Yes, sir. That is correct. In my view he had evidenced some disloyalty to his superiors, based on the information that I gleaned from that very brief resumé of his case in that meeting.

Q. Yes, sir. And you not only expressed those views very strongly to Mr. Haldeman, but on your own you sent it to six of the top members of the staff at the White House who exercised very important policy-making functions?

MR. KELSON: I object to the term "on your own".

THE WITNESS: But that was very much a part of [148] writing this. It was important in my view to send this to others concerned, and I don't think I even included all of them because I am sure, my guess is that there were other people in the original Haldeman meeting, although it was not a prime issue in this meeting—it was sort of a peripheral minor item among a number of items discussed at the meeting. It was not called for this purpose; it was just something that came up. And I am sure there were others who were in that meeting and who probably should have been informed also. But I think it is as important for Dr. Kissinger to know that I am even, that I am even giving any information at all on a former Defense Department employee, as it is the principal addressee, Mr. Haldeman, and the same for Klein and Colson. I honestly believe that I would have been remiss if I hadn't given it this kind of circulation at least, because as I said earlier, Mr.

Haldeman was going to count on opinions from others, certainly not just from me, in the development of a position or in preparing the President for a possible question on the Fitzgerald matter at his forthcoming press conference which is mentioned in the memo.

MR. BODNER: (Resuming)

Q. When you sent that memorandum to Mr. Haldeman, under the "others" showing, on the second page, you fully realized,

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Excerpt From
The Deposition of
John Ehrlichman (R. 444)
[pp. 10-14]

[10] Q. Do you recall ever discussing Mr. Fitzgerald's situation, and I will use that as a shorthand term—if we need to define it, we will do so—but did you ever discuss Mr. Fitzgerald with Mr. Haldeman? A. Not that I can recall.

Q. Mr. Harlow? A. No, I don't recall discussing it with him.

Q. Mr. Butterfield? A. No.

Q. Mr. Nixon? A. Yes.

Q. Now would you tell us in what context you discussed Mr. Fitzgerald with Mr. Nixon? A. There was a press conference at which Sarah McClendon asked a question about Fitzgerald and some other people—or other transaction, and there was a conversation—let me see if I can get this right.

There was a conversation at a budget session, I believe following that press conference, about the advisability of bringing Fitzgerald into the White House or the Bureau of the Budget, and I was either a participant or at least an auditor of that conversation with the President.

Q. Do you have any independent recollection as to what went on at that discussion? [11] A. I have a refreshed recollection based on my notes of that session, and a subsequent memo that I wrote to Mollenhoff.

MR. MORTENSON: Can I ask that the documents that were previously given to Mr. Ehrlichman be given to him again?

BY MR. MORTENSON:

Q. Could you pull out and have the reporter mark the document that is your notes which refreshed your recollection?

Off the record.

(Discussion off the record.) (Defendant's Exhibits Nos. 134-162 were marked for identification.)

BY MR. MORTENSON:

Q. Mr. Ehrlichman, the reporter has just marked defendant's exhibits 134 through 162.

My question is, having watched that process take place, are those the documents I sent you in connection with your appearance here today? A. Yes.

Q. And have you at some point or other reviewed each of those documents? A. Yes.

Q. To make sure we are covered on this, during our session before the deposition I showed you one additional document; do you recall what that document was? [12] A. It was something that I had not seen before. I have forgotten what it was.

MR. MORTENSON: Let me have the reporter mark this. (Defendant's Exhibit No. 163 was marked for identification.)

THE WITNESS: Yes, that is the transmittal for a press briefing.

BY MR. MORTENSON:

Q. So defendant's 163 was also shown you in connection with our session?

A. That is right.

Q. Now to get back on track would you pull out the set of documents you have seen prior to the deposition the one you referred to as your notes with the meeting of the President? A There are four of them, actually.

Q. Would you give us the numbers? A 148, 149, 150, and 151.

Q. Would you tell us briefly in descriptive form what each of those is? A The first three, 148, 149 and 150, are my handwritten notes from meetings with the President and others. 151 is a copy of a memo that I wrote Clark Mollenhoff on December 30, 1969.

Q. Based on your refreshed recollection, are you aware [13] of any effort on Mr. Nixon's part to cause Mr. Fitzgerald's employment at the Bureau of the Budget? A. Yes.

Q. Can you tell me what your refreshed recollection is in that regard? A. Yes.

Apparently, he decided to put Fitzgerald into the Bureau of the Budget, and it was discussed on or before the 11th of December, 1969. Then again, he discussed it with the Director and the Deputy Director, and Assistant Director of the Bureau of the Budget in my presence on the 17th of December, and then again with the Director and Deputy Director on the 23rd of December, at which time he decided not to do it.

Q. Do you recall anything that Mr. Mayo, the Director of the Bureau of the Budget, had to say about Mr. Fitzgerald's employment at the BOB? A. Not specifically. But the thrust of his position was that he didn't want him.

Q. What did Mr. Nixon say, if you can recall? A. He decided to go along with Mr. Mayo. That was in the ultimate meeting on the 23rd.

Q. Does defendant's exhibit 151, the memo to Mr. Mollenhoff, is that what prompted that memo to be sent? A. Well, that was communicating the President's [14] decision to Mr. Mollenhoff, and it was prompted by the fact that I wanted to get Mollenhoff off my back.

Q. In the discussions that are reflected in your notes, do you recall Mr. Nixon ever speaking negatively toward Mr. Fitzgerald? A. No, I don't.

Q. Do you recall him expressing any animosity toward Mr. Fitzgerald? A. Not at this time, no.

Q. Did you get any impression that the position that was going to be—that a Bureau of the Budget position was to be some sort of deadend job or something with not much responsibility?

MR. VON KANN: I would like to note that there has been quite a bit of leading, and I have been prepared to tolerate it to expedite things. But I think that is one leading question too many.

BY MR. MORTENSON:

Q. Moving on, after you wrote the memo to Mr. Mollenhoff indicating the President's ultimate decision with regard to

Mr. Fitzgerald, do you have any recollection of any contact having to do with Mr. Fitzgerald prior to, say, 1973? A. No.

Q. Apart from these discussions reflected in your notes, do you have any recollection of any conversation you had in

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Excerpt From
The Deposition of
Alexander M. Haig (R. 470)
[p.36]

[36] Q. Did Mr. Butterfield submit memoranda from time to time to you in your official capacity at the National Security Council concerning policy recommendations or recommendations for actions or inactions by the Administration? A. Not very often. As I recall in that period, in that area, Butterfield's responsibilities involved White House security and procedural matters. I don't recall his being a vehicle for any substantive matters. He was highly administrative in character, getting the papers together for the President, the deadlines, internal security.

Q So if I understand you correctly, his role, as you understood it, from having known him and talking to him, did not involve sending substantive memoranda to your office at the National Security Council—substantive as opposed to—A As a rule, no. But there could have been exceptions. I don't recall any.

Q Now, Mr. Landman showed you a memorandum previously about Mr. Butterfield, and I think he mentioned there was no indication on it that you would have seen it.

Let me show you Plaintiffs Exhibit 237. I note the second page of that same memorandum appears—or a version. I will ask whether reviewing the memorandum at pages 2 and 3 of Plaintiff's Exhibit 237—You might want to read the first page of the exhibit. A You want me to read—?

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Excerpt From the
Deposition of Harry R. Haldeman (R. 418)
Taken on Feb. 7, 1980 [pp. 4-9]

[4] HARRY R. HALDEMAN, called as a witness, and being first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. LANDMAN: Q. Mr. Haldeman, would you please state your full name for the record? A. Harry R. Haldeman, H A L D E M A N.

Q. I'd like to show you Defendant's Exhibit 143, which has previously been marked in this case.

MR. VON KANN: Mark, I'd just like to establish on the record: Are you representing Mr. Haldeman at this deposition?

MR. LANDMAN: Yes, I am.

MR. VON KANN: For reasons which I have previously stated, which I will not belabor, we object to that representation.

MR. LANDMAN: Fine.

THE WITNESS: Okay.

BY MR. LANDMAN: Q. Are you able to identify this document? A. Yes.

Q. Okay. What is it? A. It's a page of handwritten notes in my handwriting, dated 12-9, no year indicated.

Q. Based on, looking at these notes, do you have [5] any idea of when, during the course of a day, on what occasion you would write these notes?

MR. VON KANN: On what occasion he would write these notes or did write these notes? You mean notes of this kind, or when did he specifically exhibit write Defendant's Exhibit 143?

BY MR. LANDMAN: Q. Do you have a specific recollection of writing this document, Defendant's Exhibit 143? A. No.

Q. But based on your practice and procedure in the White House, can you reconstruct when you would have written these

notes? A. These are in the form, and in looking at the overall content, I would say they fit the form of notes that I customarily made in all meetings with the President.

Q. Referring to the very last entry in the notes, I believe there is a check mark. And without representing what it says, it might be an E, if you could read that? A. There is a check mark and an E in the margin. And the note says, "Schlessinger—put Fitzgerald in budget"—then on the next line—"on nondefense problems."

Q. Other than what is here in this note, do you have any independent recollection as to what that means? A. Not as of that time. I do in the context that—of this case.

[6] Q. Okay. What does that indicate? A. It's an instruction, first of all, to me, to instruct Ehrlichman to instruct Schlessinger to find a position for Fitzgerald in the Budget Bureau working on nondefense problems, an assignment in an area other than defense.

Q. And who gave you that instruction? A. The President.

Q. I'd like to show you the next document, which I don't believe has been marked. What document are we on?

MR. MORTENSON: Off the record.

(Off-the-record discussion.)

MR. LANDMAN: Would you please mark this as Defendant's Exhibit 181.

(Defendant's Exhibit 181 marked for identification.)

BY MR. LANDMAN: Q. Are you able to identify Defendant's Exhibit 181? A. Yes.

Q. What is it? A. It's a note in my handwriting—

MR. VON KANN: Sorry to interrupt you, sir, but so we are clear: When you asked this witness to identify, I take it you were asking him if he has some recollection of what the document is? You are not asking him to look at it as any fresh intelligent human being would come along and [7] perceive that it purports to be from X to Y dated such and such?

MR. LANDMAN: That's correct.

MR. VON KANN: You are asking him if he has a recollection about this particular document?

MR. LANDMAN: Yes.

MR. VON KANN: Go ahead.

THE WITNESS: In that context, I don't have a recollection of the document at the time it was created. I am able, out of my knowledge of my own writing and actions, to identify what this is.

BY MR. LANDMAN: Q. Okay. Would you please do so? A. It's a handwritten note on White House memo pad form identified as confidential, dated December 9, to Mollenhoff, from me, identified as a F Y I memorandum.

Q. F Y I meaning? A. For your information.

Q. And what does it say? A. It says. "The P," which means president, "has asked Mayo to bring Fitzgerald into the Budget Bureau to work in nondefense areas." And it's signed H, which is my initial.

Q. I'd like to show you what's previously been marked as Defendant's Exhibit 146. Would you please identify this document? A. This is another page of handwritten notes in my handwriting, from a meeting with the President. It's dated [8] 12-18.

Q. And referring to the third entry on that document, would you please read what that says? A. There is an L and a check mark in the margin, and the item says, "Fitzpatrick at budget (sic)," and there's an arrow pointing down, and then a line that says, "Z, call in big broad and tell her he has a job." On the next line it says, "or E," and under broad there's a slant line and the name Sarah McClendon.

Q. And these notes would have been written when you were in a meeting with the President? A. Yes, using the President's terminology.

Q. Okay. A. I'm not going to take on Sarah McClendon.

Q. And—

MR. MORTENSON: Off the record.

(Off-the-record discussion.)

BY MR. LANDMAN: Q. Would you please state what the President is instructing you to do?

MR. VON KANN: Wait a minute. I object if you are asking Mr. Haldeman to tell you what was in Mr. Richard Nixon's mind on 12-18 of some year when he uttered these words about the big broad. If you are asking Mr. Haldeman to tell you what he perceived his instruction to come from Mr. Nixon, I think that's a fair question.

BY MR. LANDMAN: Q. What did Mr. Nixon tell you to [9] do as reflected in Defendant's Exhibit 146, the third entry? A. Based on this, the subject is Fitzpatrick at the budget, at budget, which in the context of the earlier material we have looked at would mean the job for Fitzpatrick at budget (sic). And the instruction is "Z," which would be Ziegler, "call in Sarah McClendon," a newspaper reporter, "and tell her he," Fitzpatrick (sic) "has a job," and the "or E," would mean or Ehrlichman. In other words, I could call in Ziegler or Ehrlichman and tell one or the other to tell Sarah McClendon.

Q. And what does the L indicate with the check mark? A. L refers to Larry Higby, my assistant.

Q. And the check mark? A. And the check mark means that I have done this. What that indicates is that I have told Higby to carry out this instruction.

Q. Okay. Do you have any recollection that there was ever an effort to get anyone by the name of Fitzpatrick a job at the Bureau of the Budget? A. No.

Q. Does this refresh your recollection that there was an effort to get Mr. Fitzgerald a job at the Bureau of the Budget? A. Yes.

Q. I'd like to show you what's previously been

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Excerpts From
The Deposition Of
Bryce N. Harlow (R. 392)
[pp. 58, 60, 173, 176, 183-86, 189-90]

[58] occurred at a so-called Prayer Breakfast at the White House? A No, sir, I don't believe there were Prayer Breakfasts at the White House. I think it was quite possible it was a breakfast in place of a lunch. It was a Congressional meal, I do remember that. I was in charge of it, high rank with the President and a group of Congressmen. It may have been a breakfast instead of a luncheon, I don't know that for sure. But, it was a Congressional meal that I had arranged with the President and a large group of Congressmen. The State Dining Room was filled up with people and the breakfast, lunch, the meal was in progress and I had to . . . as I remember, I had to leave the room to talk with the secretary, because he suggested he wanted to talk to me. I may be mistaken on that. They may have just adjourned, I don't recall for sure. I do know that it was an embarrassment to me, the way the secretary didn't realize in that I was charged with this affair, he was intruding on me at this time to talk about something and I was worrying about the President. I was worrying about my Congressional charges to make sure this worked right and that's the reason I remember it actually because of my feeling . . . "I mustn't be diverted this way at these breakfasts" or luncheons, or whatever it was, this meal that I put on because I've got to look after these people. That's the only real reason I remember, I think, is because I made note to myself that I mustn't let this kind of thing happen at these meals or I'll get in trouble. That's really . . . and that's all I remember about it, actually. I don't remember what we even talked about except it was

* * *

[60] Fitzgerald?

A. I just don't remember the discussion. He was talking to me about this individual in the Air Force, as I remember it, and I was thinking to myself, "My God, I'm going to get into trouble over here in the corner whether my charges adjourn or

whether my charges talk or whatever they're doing," and I'm sorry that's the case, but that's the case. Q. Let me see if I can refresh your recollection at all, sir. With respect, first for a moment, what is listed as a May 9 phone conversation. A. Yes.

Q. Does it refresh your recollection that at some point prior to this meal you had received a telephone call from Dr. Seamans in which he indicated to you that he had a problem with respect to an Air Force employee named Fitzgerald? A. I don't recall that at all.

Q. Let me ask you, sir, to look at Plaintiff's Exhibit 94 for a moment.

(Conference between Witness and attorney Landman)

Look, if you would, at Page 11 . . . let me say this, sir. This document was brought by Dr. Seamans to his deposition in Boston a couple of weeks ago, I've lost track of the exact date, and identified by him as a portion of a exit interview which he gave upon leaving the office of Secretary of the Air Force. He testified that he was interviewed by certain people who asked him questions about certain matters that had arisen while he was secretary of the Air Force. He discussed those matters and the questions and answers were

* * *

[173] Q. To the extent you have any recollection did you ever come to that agreement with Mr. Nixon? A. No.

Q. Now, to the extent you have a recollection on the subject, did you ever come to an agreement with Dr. Seamans to bring about the firing of Mr. Fitzgerald in his position in the Air Force?

BY ATTORNEY von KANN:

Objection, leading and let me try to crystallize the other objection, which is that the witness having told us heretofore that he's given us the fullest extent of his recollection of conversations with Dr. Seamans and Mr. Nixon and others, the question therefore is predicated on the existence of a fact i.e.

further recollection which the witness has expressly denied. To that extent I think it's an improper question.

Q. Now, you may answer. To the extent you have a recollection, whatever that recollection is, did you ever agree with Mr. Seamans to bring about the firing of Mr. Fitzgerald? A. I have no present recollection.

Q. To the extent you have any recollection of lack of recollection, did you ever come to that agreement?

BY ATTORNEY von KANN:

Same objection. A. As I stated, I don't recall any of my discussions with Mr. Seamans. I would like to be able to go on to say this. That I knew very actively that Mr. Laird ran a very taut

* * *

[176] BY ATTORNEY von KANN:

Same objection.

Q. Did you ever agree with Mr. Haldeman to take action to bring about either the firing or to present the reinstatement of Mr. Fitzgerald in the Air Force?

BY ATTORNEY von KANN:

Same objection. A. Not to my knowledge.

Q. Did you ever agree with anyone to take actions to cause any agency or department of the Air Force to investigate Mr. Fitzgerald?

BY ATTORNEY von KANN:

Same objection. A. Not to my knowledge.

Q. Have you ever tried to prevent Mr. Fitzgerald from gaining employment outside of the Air Force?

BY ATTORNEY von KANN:

Same objection. A. No, sir.

Q. Do you recall whether Mr. Mollenhoff when you had your discussions concerning his activities in connection with Mr. Fitzgerald, whether Mr. Mollenhoff asked you whether you had spoken to Dr. Seamans about the matter? A. I don't recall my discussions with Mr. Mollenhoff except I apparently had some.

Q. Would you take a look for me, please, at Defendants' Exhibit No. 40. A. Yes, sir.

* * *

[183] that you wanted to go in and tell the President about it. A. I recollect no specific instances of this, but it would be astonishing if it didn't occur.

Q. Now, based upon the documents which you've seen concerning the Fitzgerald matter in this case, based upon what you now know through communications with counsel or anything else concerning the Fitzgerald matter and thirdly, based upon what recollection you do have concerning Mr. Fitzgerald, how would you rank the significance of the Fitzgerald matter to the panoply of issues that you were handling in the White House in 1969?

BY ATTORNEY von KANN:

Objection, unless there's some more specificity in what you mean in terms of time devoted, in terms of political sensitivity, in terms of difficulty, in terms of legal complications, in terms of moral character. Unless there's some frame of reference given I think the question is too open ended and vague.

A. I think I have said earlier that it was a non-issue, in my judgment, at the time, not even a routine issue. The reason I said this is it relates to the question you've asked me, I guess, the size of these problems and the intensity of the White House activity people don't believe when you explain it to them and the President of the United States at this time had surrounded himself with people trying to help him with his job. They were charged with problems like a war going in Asia and the desperately serious problems of extricating America from that awful thing and with all of [184] its terrible fallout inside the

United States. It was also a cause of constant deep, deep concern. There were defense measures of the ABM that were active at the time that required a tremendous amount of attention from the White House and there were all kinds of new reform measures of the President on Capitol Hill legislative that notably included one that I tried desperately to urge him to delay on something because of the enormous controversy it would cause amongst his own friends and irritation and anger, the reorganization of the Post Office Department. And, it had the result that I predicted. There was a tremendous amount of that, all of which, of course, I devoted my time to, plus this season of every new administration, not just the Nixon Administration, no particular administration, all administrations in the early days go through a season of walking through a vat of acid and that season is the season of staffing in the Administration. Every member of Congress has an enormous number of appointees he wants to put in the new Administration who is of the President's party. He has been starved personnel-wise for the period the other party has been running the Executive Branch and so he wants the President to make some friends of his Assistant Secretaries or Secretaries or a Commissioner of this or a Commissioner of that or Head Administrator of this or Administrator of that. A number of key positions in each department. There are things going on right now with President Carter. These in the season are so intense, very intense the first nine (9) months to twelve (12) months [185] of a new Administration. So, the people dealing with Congress at that time go through a vat of acid, as I say, for that reason in that arena. That's true of every Administration, true whether it's a Larry O'Brien or a Bryce Harlow, it makes no difference. During that period there are very hard feelings, very difficult times with members of Congress for the in-power Administration, the new one, very difficult times. All of that consume issues as if you're walking around in a Bessemer furnace if you prefer that to a vat of acid all during that time. In such an arena an issue of this kind which properly belongs for administration inside the Executive Branch should be kept there and not bothered with by the White House. There is a constant tendency on the part of the administrators in the government to move their problems to the White House to have them handled

for them. There are lots of pressure for that. You spend half your time telling them to keep it to themselves and handle it themselves while you look after the President's concerns, that those are not properly there. In this kind of case, there were no such attempts, as far as I know, unless there was an attempt and not to my recollection at all by Mr. Seamans. I don't know why he would have done that because Mr. Laird above almost all of the other administrators in the Executive Branch was opposed to going to the White House for things of this kind and wanted them handled inside the Defense Department, that I know. Now, all of that combined makes me say it was a non-issue in the arena which I thought at the time and I think that's why I [186] was not concerned with it and did not recollect anything about it. I did not have time to study it. It's a very complex matter and I didn't know anything about it, didn't have time to try to find out about it and I couldn't take the ex-parte advice about it from any individual in the United States. I would have to look in it deeply in order to counsel anybody in the White House, the President expecially about it, therefore, I did not and to this very day I don't know any detail about it. It was clear off the radar.

Q. No further questions.

END OF CROSS-EXAMINATION BY
ATTORNEY MORTENSON

CROSS-EXAMINATION

BY ATTORNEY MARK S. LANDMAN:

Q. Mr. Harlow, in his deposition and without characterizing any of his testimony but words to this effect, Mr. Mollenhoff described a conversation with you and with regard to the Fitzgerald matter and he particularly noted the fact that you failed to tell him that you had earlier discussed the Fitzgerald matter with Dr. Seamans. Now, I know you don't recall the substance of those conversations with either Mr. Mollenhoff or Dr. Seamans, but I'm wondering if based on

general practice there was any reason why you did not tell Mr. Mollenhoff, even assuming that he asked you, about your communications with Dr. Seamans?

BY ATTORNEY von KANN:

Just a moment. I object on the grounds of having said you

* * *

[189] it was why would I have talked about it in the White House? I had no reason to do that.

Q. Focusing in on the first six (6) months of the Administration in 1969, would you have any ability to estimate how many phone calls you received on any given day? A. I was told at the time I was averaging four (400) hundred calls a day incoming. I didn't have time to count them, I don't know, but I would say the figure sounds easily that much to me. You could not hang up the phones in my office. They would ring constantly and there was no way to handle the calls. There were infinitely more calls than could be returned. So many calls came in the early days to me because of my background, not for any other reason but because of my background. Nobody knew the other people. They all knew me. The calls all came to me as a result. But, so many calls came that I had to have the White House carpenter repair an insert into my desk drawer into little bins and I would have my secretary arrange the calls into call slips. No. 1 bin was President and Vice-president; No. 2 bin was Cabinet Offices, No. 3 bin was leaders . . . selected leaders of Congress; No. 4 bin was sub-cabinet people; No. 5 bin senior members of Congress, committee chairmen, et cetera; No. 6 bin was leaders in America; No. 7 bin other significant governmental officials; the next bin way down there press; next bin friends, other. That was in my right-hand desk drawer and I'd come back from Capitol Hill, from the President's office or whatnot and [190] I would open that. That was always overflowing, all bins and how many calls, like leaves in the Fall. This went on for the first, oh, in that same intensity virtually without changing in the first six (6) months, at least, and then started slacking off as I was able to shift that slowly to my assistants and as I was unavailable.

Q. What recollection, if any, do you have of conversations with Mr. Butterfield with regard to Mr. Fitzgerald or the C-5A matter? A. I have no recollection of discussing it with him.

Q. I show you Defendants' Exhibit 40 and I believe you have testified somewhat about your typical practice as to seeing a document such as this. Well, you reviewed it and you have testified, I believe, it was your handwritten initials on the document. My question is that whether you can recall whether or not you dictated any type of memorandum with regard to Defendants' Exhibit 40? A. I don't think so. I don't know why I would have. I have no recollection of doing it.

Q. When you say you don't know why you would have, what do you mean? A. Well, I don't know what would necessitate it. Mr. Mollenhoff for good sufficient reasons known only to him wished to push this through me, he did so. I had to take home with me at night stacks of literature to read every night until two o'clock in the morning and this was probably amongst those and I probably read it and initialed it and moved it out. I wouldn't have had time to devote

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Excerpts From
The Deposition Of
Richard Kaufman (R. 472)
[pp. 8-9, 28]

[8] of that, witnesses. It was an important consideration. But the problem was first to decide what the general subject matter would be, what the main issues would be, and then to try to match potential witnesses with those issues.

Q. I would like to discuss now the hearings that took place in around November of 1968 at which we all know Mr. Fitzgerald testified. Now, I would like if you could to just start at the beginning and if you could describe for me how those hearings were planned, and how it was that Mr. Fitzgerald was eventually chosen to come and testify as a witness, if you can recall. A. We had had hearings in 1967 on the general subject of government contracting, including Defense contracting, and a report on those hearings had been issued by the subcommittee. I believe that report came out in early 1968 or spring of 1968, but I would want to check the date of that. Following the issuance of that report, the chairman decided that he did want to have a hearing that year on the same general subject, the report that I am referring to was very critical of the Defense Department for its management of procurement policy and the chairman wanted to look further into the areas that were touched on by that report. And he also wanted to look at some specific cases of major procurements and weapons systems so that some of the issues we had been discussing previously would be illustrated by examples of [9] current procurements. Following that general direction from the chairman, I began discussing with a very wide circle of individuals questions about Defense contracting and the management of Defense contracts and questions involving profits on Defense contracts and the costs of government contracts and ways to control those costs. The number of individuals that I talked with, as I indicated, was quite large and included people in various capacities within the government and outside the government in universities and think tanks and various other places.

Q. Was one of these people Mr. Fitzgerald? A. Yes.

Q. How did you come to decide to speak to Mr. Fitzgerald about these upcoming hearings? A. Several of the experts whom I had been discussing the subject with had mentioned Mr. Fitzgerald to me and had suggested that he would be an interesting person to talk to because of his expertise and because he had been making speeches and had written some essays on the subject that I was interested in.

Q. Had you known Mr. Fitzgerald before this gentleman suggested that you speak to him? A. No, I had not and as I say, several people had mentioned Mr. Fitzgerald.

* * *

[28] clear in my mind that he would be a very good person to include in our hearings.

Q. For what reasons did you consider him a very good person to include in the hearings? A. There were several. One was that he was an expert, he was well regarded by his peers and by people as I say who recommended that I talk with him as knowledgeable and insightful. Secondly, he had had experience in the private sector as a consultant with various major contractors before he came to the Air Force, and so he had had exposure to both sides; that is, to the contractor side and to the government side. Thirdly, he was very unbureaucratic in the sense that he was candid. He was plain spoken. You did not get a lot of the kind of gobbledygook or bureaucratese one often encounters with career civil servants, and he was very refreshing in his willingness to be critical of the government's efforts and of the problems generally of controlling the costs in major government contracts, and he did have knowledge of current programs, practices and policies and it was one of our specific objectives of his hearing to talk about current programs and current practices rather than older ones or things that had taken place years ago and were of more historical interest than current interest.

Q. Was the C-5A program one of the current programs

* * *

Excerpts from
the Deposition of
Melvin Laird (R. 455)
[pp. 15, 22]

[15] A. No.

Q. In learning about the facts of reorganization, that it would include the elimination of Mr. Fitzgerald's position, were you ever informed by anyone that the purpose of the reorganization and getting rid of that position was designed to teach Mr. Fitzgerald a lesson or retaliate or in any other way that it was prompted by his having testified about the C5A?

MR. RAVEN-HANSEN: I object to the form.

THE WITNESS: No.

BY MR. MORTENSON:

Q. Now, do you ever recall discussing Mr. Fitzgerald at anytime, with Mr. Nixon? A. No, I have no recollection of ever discussing Mr. Fitzgerald with Mr. Nixon—with President Nixon.

Q. Do you have any recollection of ever discussing Mr. Fitzgerald with Bryce Harlow or Mr. Alexander Butterfield? A. No.

MR. MORTENSON: Let me have this marked. (Defendant Laird Exhibit No. 132 was marked for identification.)

BY MR. MORTENSON:

Q. I ask you to look at it, Mr. Laird, and having done so, my question will be, whether you can identify it.

* * *

[22] testimony and for the exercise of his First Amendment rights.

The only named defendants are Mr. Nixon and Mr. Butterfield and Mr. Harlow.

My question is: Do you have any information that Mr. Nixon or Mr. Harlow or Mr. Butterfield ever took any action

adverse to Mr. Fitzgerald for the purpose of retaliating against him for having testified before Congress? A. Not as far as I am concerned.

Q. For his having exercised his First Amendment rights? A. No, I have no knowledge.

MR. RAVEN-HANSEN: Let the record show consultation between Mr. Laird's counsel in the form of Mr. Landman and Mr. Nixon's counsel.

MR. MORTENSON: Let me have this marked Laird No. 2. (Defendant Laird Exhibit No. 133 was marked for identification.)

BY MR. MORTENSON:

Q. I will not represent that those documents belong stapled together. They are stapled together for the purpose of the deposition, for convenience.

I would like you to look at that and in doing so, tell me if you can identify them? A. I can identify them.

* * *

Excerpt From The
Deposition of Robert P. Mayo (R. 460)
[pp. 3-7]

[3] ROBERT P. MAYO, the witness, having been first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY
MR. LANDMAN:

Q. Mr. Mayo, would you state for the record your full name? A. Robert P. Mayo.

Q. What is your residence address, please? A. 302 Woodley Road, Winnetka, Illinois 60093.

Q. What is your position now? A. I am president of the Federal Reserve Bank of Chicago.

Q. What was your position in late 1969 and early 1970? A. I was the director of the U.S. Bureau of the Budget.

A. Do you know Mr. Fitzgerald, A. Ernest Fitzgerald, the plaintiff in this case? A. I have never met Mr. Fitzgerald.

Q. Have you ever heard of Mr. Fitzgerald? A. I have heard of Mr. Fitzgerald, yes.

Q. What was the source? How did you hear of Mr. [4] Fitzgerald? A. I believe I heard of him through Jim Schlesinger, who was Assistant Director of the Budget under me beginning, I believe March 1969. I may also have read press reports earlier, but my recollection is not good on that.

Q. Would you explain how it was that you heard about Mr Fitzgerald from Mr. Schlesinger, why you were discussing Mr. Fitzgerald? A. The only memory I have is merely a statement of fact by Mr. Schlesinger that a problem had come up in the administration of the Defense Department with regard to Mr. Fitzgerald.

Q. When did that discussion occur? A. I do not recall.

Q. Did you ever have any discussion in late 1969 with anyone in the White House with regard to Mr. Fitzgerald? A. Late in 1969—

Q. Specifically, in December of 1969. A. In December of '69, yes. This was a point that was brought up by President Nixon in a budget review session as an incidental point to the meeting. I believe Mr. Schlesinger was with me at the time, and my recollection is that Mr. Ehrlichman was there, too.

[5] in that conversation my recollection is that Mr. Nixon said, "Bob, I wonder if you could look at the non-defense area in the Budget Bureau to see if there would be anything that would be available for Mr. Fitzgerald."

Q. And what did you proceed to do? A. I proceeded to go back and discuss it further with Mr. Schlesinger, and to make sure that my representation to the President should include the fact that we in the Budget Bureau, being in the position of cutting a great deal in other programs, were very careful to run our own bureau in a way that was exemplary.

We had no vancies at that time, to the best of my recollection, in the top grades in the Budget Bureau, and that to me was a major consideration in suggesting to the President that I didn't think that we really had a position available for Mr. Fitzgerald.

Q. Were there any other considerations? A. Yes, there was. It had been represented to me, although I have never met Mr. Fitzgerald, that he did go directly to Capitol Hill on occasion and was providing information to a member of Congress in a way that was inconsistent with the program of the President of the United States, who, if I remember correctly, was President [6] Johnson at that particular time.

Q. And when you told the President that you were not able to take Mr. Fitzgerald on at the Bureau of the Budget, what was the President's reaction, if you can recall? A. He said, "Bob, you are absolutely right, that I don't think that there really is a place for Mr. Fitzgerald in your organization." And to my recollection, that was the end of the matter.

Q. When the President indicated that "you are absolutely right," was that in a sense that he was agreeing with your analysis or that he was not overriding your decision, if you can tell?

MR. VON KANN: Objection. Leading.

Q. You may answer. A. Well, I think he was agreeing with my analysis. I can't explore the President's mind that closely ten years afterwards, but that would be my impression.

Q. Well, did the President ever direct you or specifically order you to hire any individual at the Bureau of the Budget? A. Never.

Q. Do you recall ever discussing Mr. Fitzgerald with the President prior to that time? [7] A. I can recall no such discussion.

Q. Do you recall ever discussing Mr. Fitzgerald at any time with Bryce Harlow? A. No.

Q. Do you recall discussing Mr. Fitzgerald at any time with Alexander Butterfield? A. No.

Q. Do you know Dr. Seamans or did you know Dr. Seamans? A. Yes.

Q. What was his position in 1969? A. He was Secretary of the Air Force.

Q. Do you recall ever having a meeting with Secretary of the Air Force Seamans at any time during 1969 in the White House? A. Yes, I do. It related to the consideration of what we called the—what was it?—the blue-suit-man-in-space program, familiarly known as MOL.

Q. "MOL" standing for, if you know? A. You know, I can't recall. But it was the MOL program, and it was a program that Mr. Seamans worked very hard on in earlier years. Then he went back to GE, I believe it was—but that's not relevant anyway—and then came back as Secretary of the Air Force, and

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Excerpts From
The Deposition of
Clark R. Mollenhoff (R. 330-32)
[pp. 112-13, 186]

[112] was in this memorandum. I would have elaborated, and sure did, I elaborated both from the standpoint of a security risk and the conflicts of interest contention and to, in so many words, say, at this stage they appear to be stalling. It appears to be a bunch of crap. I would have put it in just about those terms. They should get back to me if they've got anything. Damn it, they should have been back a long while ago. It looks to me like Seamans has got a wrong situation here.

Q. Did Mr. Harlow indicate to you that you come back, you haven't heard yet, but, if you do, let me know about it?

MR. RAVEN-HANSEN: Objection. Why don't you ask him what Mr. Harlow said?

MR. MORTENSON: I am taking the position he is a hostile witness and I am taking the position I can lead him, that's why I am asking that.

THE WITNESS: I don't recall what Mr. Harlow's response was on that. In a general way, he did not argue with my facts. He expressed an interest in keeping—in being kept advised on the matter, and he was assuring me that he was taking it up and making sure that the President knew all about these things.

[113] Q. Did he indicate to you that he was getting some pressure from the Hill already on the Fitzgerald matter? A. At some point he chimed in something about there being some complaints from the Hill that were basically in line with the same position that I was taking and that they were going to have to deal with that too.

Q. Mr. Mollenhoff, getting away from the impressions that you have for just a moment, and focusing in on exactly what Mr. Harlow said, did he ever say to you, "Clark, I have spoken to the President about this" and "the President feels this way, that way or the other way"? A. He said that he had talked to the President about this, that the President was basically in

agreement; that this was a precarious situation; that the President wanted me to keep on top of it. And he would have at some point said, "you are not the only one who is raising questions about this", that they had had some communications from the Hill. At precisely what stage that took place, I am not certain.

Q. When you say "that took place", you are referring to what? A. His comments about complaints from the Hill. In the first conversation, I am sure he did not say anything

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[186] BY MR. MORTENSON:

Q. I am asking you if you know firsthand, apart from what somebody told you, that Nixon was aware of the Fitzgerald matter. A. I had been told my Harlow that he was involved in this, that he knew about it. He knew the details. I was told by Haldeman that these messages had been getting through to the President and that he was going to do something about it.

I knew that in the press conference, I knew from Buchanan that he had taken my memorandum and had produced a memorandum to the President which was a part of his briefing book, and that he had read the briefing book.

What more can one do? The thing is he was unavailable. I tried to see him during that period of time, and I couldn't get through Haldeman.

Q. Now, this was all after the termination, right?

MR. RAVEN-HANSEN: I don't understand your question.

BY MR. MORTENSON:

Q. After Fitzgerald's termination? A. Yes, in November, 1969.

MR. RAVEN-HANSEN: I object to the question. It

* * *

Excerpts From
The Deposition of
Richard Nixon (R. 378)
Taken on October 2-3, 1979
[pp. 8-16, 27-31, 37]

[8] clarify, as I understand where you are headed on this, you are not asking what he's been told about Mr. Fitzgerald and all the things that he's learned happened at the D.O.D. or at the White House or whatever. You are asking what did he know at different points in time about Mr. Fitzgerald, what he did, what he said, et cetera.

MR. PRETTYMAN: Exactly. Based upon his present recollection.

MR. MORTENSON: Okay.

MR. PRETTYMAN: As I understood his answer before, at the time of the institution of the lawsuit he recollected nothing about Mr. Fitzgerald; but since then, of course, in preparing for this, he may or may not have had his recollection refreshed. And I'm simply asking him now everything that you recall. A. Well, again, trying to recall everything from this mass of material that I have not read at all, of course, and separating those things that I recall and things that others have submitted which I do not recall, this would be my best recollection.

I'm trying to get the dates in my mind. My first recollection of Mr. Fitzgerald's case is during the period when I was preparing for a press conference which occurred on December 8, 1969. That of course was 10 years ago, so what I am now telling you is based on studying the, not only the documents, but also consulting with counsel and [9] trying to refresh my recollection in that respect. In preparing for the press conference, I found in a briefing book a suggested reply to questions, or a question, that might come up on Mr. Fitzgerald and also an addendum in the book which Mr. Buchanan—who had responsibility to not only prepare the book, but to channel all suggestions from administration people as to particular areas that might be covered in the press conference—an addendum on this particular matter in which, in short, he indicated there

was controversy within the White House staff, and for that matter, it could be said, within the administration, as to how I should respond to questions on Mr. Fitzgerald.

On the one hand, the suggestion was that I support a decision that had been made by the Secretary of Air Force to, in his reorganization, to plan a decision to eliminate a number of jobs, including the one for Mr. Fitzgerald. A strong dissent, Mr. Buchanan included in his addendum to the briefing book, which was the way it was prepared—a book was prepared a week in advance; and then an addenda would be added as various views came in.

And the dissent which Mr. Buchanan supported was by Mr. Mollenhoff, who was then on the White House staff, indicating that I should not support the position of the Secretary of the Air Force and of the Defense Department in this matter.

At the press conference itself—I now go to [10] that—the—a reporter, I think—first name—Sarah, rather famous—Sarah McClendon, asked a question about several people in the Defense Department, including Mr. Fitzgerald, and I—since it was a rather long and rambling question, I said that in effect, that I would look into the matter. The record will speak for itself. You have that record. Shortly after the press conference, based on my, what would have been my usual practice, having answered the question in that way, based on my study of the record, based on my consultation with counsel and their study of the record, I told someone on the staff—and I would say that it was probably—I'm almost certain, but I cannot be sure—probably Mr. Haldeman—to look into the matter.

Thereafter, again not certain on the dates, but sometime before the—within, I would say, around a couple of weeks, I was informed again, I believe by Mr. Haldeman, that another position had been found for Mr. Fitzgerald.

The matter then came to my attention again when I saw reference to Mr. Fitzgerald in a news summary report covering an editorial in the Chicago Tribune, which had, as I well recall from previous years, had made a cause celebre out of Mr. Otto

Otepka and equated the administration's handling of the Fitzgerald matter with Mr. Otepka; and as was my custom at that time, I noted my concern. And counsel has, of course, that section of the news summary dealing with this. My note in effect, as I recall, "Haldeman"—I used just the [11] letter H—"Did we fumble on this? Check into it again."

In view of the fact that I—And again, I'm trying to give my best recollection of what happened—in view of the of the fact that I had asked Mr. Haldeman to check into it again, it therefore was—bore out the statement that I made earlier, that I had asked him before.

From that time on, I have no recollection of any conversations about the matter, of any communications with members of the White House staff or others, or with people in the executive branch, no conscious recollection of any concern on the matter, which might have been raised by newspapers or other things that were written, or other media coverage.

The matter then came to the year 1973. It then was raised again in a press conference, this time by Mr. Mollenhoff, who had since left the staff and had become the chief of the Des Moines Register's Washington bureau. Counsel has, for plaintiff, has the transcript of the press conference exchange between Mr. Mollenhoff and me on the questions that he raised which I responded to at considerable length, particularly since it involved the matter of executive privilege, which was very much in my mind at that time, since it was being raised in a very different context, which did concern me a great deal, as it should have.

There were the hearings of the Ervin Committee and the demands that were being made for White House personnel to appear before that committee.

[12] At the conclusion of the—of Mr. Mollenhoff's series of questions—I believe there were three—he asked specifically about Mr. Fitzgerald and the invoking of executive privilege by the Secretary of the Air Force, Mr. Seamans, in a Civil Service proceeding with regard to Mr.—the abolition of Mr. Fitzgerald's position in the Defense Department. In response to that

question, I indicated that I—that while I had not approved the invocation of executive privilege—the invoking of executive privilege, by Mr. Seamans, that it had been invoked by someone with the authority to do so under my direction, and had been properly invoked, that as far as the—Mr. Fitzgerald is concerned, as the record of the press conference will show, that I not only supported Mr.—I'm summarizing here—not only supported Mr. Seamans, but had ordered that he be—and I use the term fired—and that I supported that position, supported Mr. Seaman's position and stood by it.

After the press conference, there were a series of conversations with members of the White House staff covering, among many other things, the response in the press conference on the Fitzgerald matter. And it became clear to me then in discussing the matter, particularly with Mr. Ehrlichmann, that I had misspoke myself when I referred to having personally ordered the firing of Mr. Fitzgerald, that I had actually confused him with Mr. Rule, who was in the Department of Defense, and who had been publicly attacking my [13] appointee for head of the O M B, the man who had major responsibility for the mass reorganization we had intended during the second term.

After the course of the conversation—those conversations—it became clear to me first that I had misspoke myself, and second, that it was necessary to do what most presidents find it very difficult to do, to have it corrected, publicly corrected. In fact, it's more difficult for press secretaries than it is for presidents . And we had had up to that time a rather good track record in being quite precise in our press conferences, and quite accurate.

And Mr. Ziegler, my press secretary, the following day, after I had talked to him briefly, in a very busy day when I was receiving Prime Minister Heath, walking over to the ceremony, or something of that sort, I told Mr. Ziegler to correct the false impression that had been left that I was referring to Mr. Fitzgerald when I used the term firing.

I think that's a summary up to this point, if counsel wants to fill it in. After all, it's a little difficult to try to recount everything. But if counsel has documents or other testimony or

something of that sort, I want to cooperate to the extent that I'm able to do so.

Q. Thank you very much. That's very helpful.

You said that the first time that you heard of Mr. Fitzgerald was in reviewing a briefing book for the [14] December 8, 1969, press conference. You had not heard his name mentioned up until that time? A. I don't recall having heard his name mentioned.

Q. And you had not read anything about him in the newspapers? A. I don't recall having—consciously recall having read anything about him, certainly not at this point.

Q. And you don't recall anyone speaking to you about him up until that point, up until the briefing book? A. In preparation for the briefing?

Q. Yes. A. No, I do not recall.

Q. When you came across his name in the briefing book, therefore, this was an entirely new name to you? Were you familiar with the subject matter in any way, or was this an entirely new subject? A. It was not a—the question of Defense Department spending was not a new subject. That had been, of course—had been and is now, always an issue. But as far as his—as Mr. Fitzgerald's specific activities are concerned, it was, yes, to my recollection—the best of my—a new subject at that point

MR. VON KANN: Let me just interrupt. Both the examiner and the witness are speaking in fairly low tones. I want to make sure the court reporter is able to hear both the questions and the answers.

[15] THE REPORTER: Yes. But I was going to ask you to keep your voice up, please.

MR. VON KANN: If the fan—

THE WITNESS: I can talk louder.

MR VON KANN: Would it help if I were to turn off the fan?

BY MR. PRETTYMAN: Q. You were not aware, up until your preparation for December, that Mr. Fitzgerald had testi-

fied before Senator Proxmire's subcommittee about an overrun on the C-54 cargo plane? A. I was not—I was not—I was certainly not aware of it in terms of the preparation for this press conference. I, of course, cannot say that in all of the reading that I had done, and so forth, that some article or something appeared, or news something, or something else, with regard to this matter. But I was not, to answer your question directly, I was certainly not focused on the matter.

Q. Just to summarize that: To the best of your recollection now, you recall nothing prior to the preparation for the press conference of December 8 about the testimony on the C-54 cost overrun? A. That's the best of my recollection now; that's correct.

Q. Now, you mentioned that it was brought to your attention by Mr. Buchanan's addendum that there were [16] apparently two different views in the White House on what to do about about Mr. Fitzgerald. And you mentioned that Mr. Buchanan and Mr. Mollenhoff issued, I believe you said, a strong dissent to the view that you should support the Air Force. Who was on the side of supporting the position of the Air Force, if you recall? A. The Defense Department. When I said within the—I said, as you may recall, if counsel will care to read the transcript, I said within the White House and within the administration. The Defense Department, Mr. Laird and others, were strongly on that side.

Q. And who besides Mr. Laird, if you recall? A. Mr. Seamans.

Q. And how did you find out that Mr. Laird and Mr. Seamans were strongly of that view? Was that in the Buchanan memo, or was that told to you? A. It was in the Buchanan memo. That's in counsel's record.

Q. So as best you recall, the only two names on the side of supporting the Air Force were Mr. Laird and Mr. Seamans; you recall no one else now who expressed that view? A. No, I don't. I don't recall anybody on there. I should explain that Mr. Buchanan had very broad authority in preparing for a press conference. As counsel knows, one must be prepared for

perhaps 300 questions in a period of 30 minutes. You may answer 10 or 15, sometimes 20. Views flow

* * *

[27] Q. A month later. You have seen the transcript of that conversation? A. Of February 28?

Q. If it was February 28, yes, sir. A. Yes, counsel has it. Counsel for plaintiff has it. I've seen it.

Q. And you were referring to Mr. Fitzgerald in that conversation? A. Yes.

Q. So I take it you did order Mr. Fitzgerald reinstated? A. Did I order him reinstated?

Q. I believe you said you told Mr. Haldeman to get him a job. A. Yes. That's the point. Now—but I should point out now: I didn't say reinstate. I don't believe I did. If I did, I'd like to correct the record.

Q. I thought you said you said to get him a job. A. I know. We are trying to reconstruct facts from ten years, and it's probably more difficult for counsel than even for me; but, no. I wanted the matter taken care of. I didn't want to have a public flap. There are several instances in this record which indicate I said he seems to be—for example, Buchanan's memorandum to me, he seems to be a dedicated public servant. That was one point of view. And he had a reputation as a cost-cutter. In fact, Ms. McClendon's [28] question refers to the fact that he cut two billion dollars out of the defense budget, as you may recall. This was back in 1969.

We must separate, Counsel, as you well know, the '69 period from the '73 period.

Q. Right. A. And that's what I will try to do; and if counsel will be of assistance to me on that, I would appreciate it.

Q. Certainly. A. But the main point is: I mainly wanted the matter handled without a flap, and I didn't want an injustice done to the man simply because he got in the way, or might

have gotten in the way, crosswise, with, basically, the Defense Department establishment.

Now, there is a Defense Department establishment. There's a State Department establishment. There's a president. And all presidents have at times have had to fight that establishment. I was not prepared at that point, or did not feel that it was wise to take them on frontally in this matter. But I did, in fairness to Mr. Fitzgerald, not only once, but as I pointed out, twice—and this is my best recollection, borne out by the facts I mentioned earlier—said, "Try to get him another position." And it was my understanding, or at least, it's my recollection, I should say, based again on these factors that I have mentioned, that on about, on or around December the 18th, that I was informed, again I believe [29] by Mr. Haldeman, that he got into a position of what was the Bureau of the Budget, which seemed to me at that point to be an ideal position for him, because, as counsel is well aware, since he is a cave dweller in Washington, the most powerful cost-cutting body in Washington is not the Defense Department and not the State Department and not the White House. It's the Bureau of the Budget. So if a person who was a cost-cutter and getting in people's hair, as apparently he was in the Defense Department, in both administrations, the Bureau of the Budget seemed to be a good position. Unfortunately, it didn't work out.

I would say now, incidentally—in fairness to counsel's client, that I—I noted that President Carter— in fact, I noted it not during the campaign but in preparing for this, that he has made somewhat of an issue, as he had every right to, of the Fitzgerald matter, because he was coming on for cost-cutting, and indicated that that wouldn't happen in his administration. And I would hope that maybe as a result of this case, as a result of this deposition, that President Carter and his administration would offer Mr. Fitzgerald now a top position in the government, which would give an opportunity for him to exercise his talents, which he apparently has, to be abrasive, as a cost-cutter must be. In fact, he might make a Director of the Budget. I'm not suggesting, of course, what President Carter should do. I'm only saying that as far as Mr. Fitzgerald is concerned, if he [30] would like to be in the government at this point and not just at

the position he currently is in, I strongly believe that he should be, based on what I know in this case, because I have had—and I have not had in the past and I have not now, any personal animosity toward Mr. Fitzgerald.

Q. You indicated that unfortunately the Bureau of the Budget job did not work out. What was the information that you received about that? A. Well, the point was that when I say the news summary a few days after the December 18 period, the news summary had the editorial from the Chicago Tribune —usually an administration supporter—but being very critical of our handling of this matter. And I wrote on the news summary, "Maybe we fumbled this. Look into it again."

Now, I had a number of things, as counsel—as I reiterate—I'm not trying to excuse, because a president is supposed to be able to handle everything, including the menus at the White House parties and who plays on the White House tennis court. But on the other hand, I do say that, in this instance, this was a terribly difficult time. Counsel was in Washington. Counsel knew people were demonstrating around the White House, that you could hardly get any sleep during that period of October, November, December, and January. I was thinking of such matters. I was thinking of other matters, too.

Right at this period, for example, in early [31] January of 1970, I was preparing my first orally delivered State of the Union message, a message on the environment, incidentally, which was then becoming a very hot issue. And we come back then to Mr. Fitzgerald in that context to find—to read in a news summary that what I thought had been done, and what was an irritating problem only, just an irritant—I didn't consider it vitally important, I must say. I thought other things were more important. But when I found that this irritant—that nothing had been done, frankly, I was frustrated. And that's what the note indicated.

Q. Excuse me. A. Then thereafter apparently, nothing was done. Now, possibly a president should not only mention something to his staff, even though it's a lower order of magnitude in terms of his own priorities, not just once, but twice, but maybe three times. I did it only two times. Maybe if I had done it again, we could have gotten some action.

Q. Did you mention a specific job or did you just simply say, "Get him a job"? A. I don't remember the specific conversation, but I knew that the job had to be one that had—that gave him at least the same pay and gave him some responsibilities. It does stick in my mind that the job had to do with the budget, which I thought would be the very best place he could be, and where, if I were a cost-cutter, I'd want to be in Washington more than anyplace else.

* * *

[37] BY MR. PRETTYMAN: Q. Do you know what the handwriting on the left hand top corner is, Mr. President? A. No.

MR. PRETTYMAN? Is this Plaintiff' Exhibit 160?

THE REPORTER: Yes, sir.

BY MR. PRETTYMAN: Q. Mr. President, you have been handed what has now been marked Plaintiff's Exhibit 160 for identification, and I ask you if that is a memo to which you previously referred as a portion of your briefing book preparatory to the December 8, 1969, press conference, setting forth the two views that were being set forth in regard to Mr. Fitzgerald? A. This is the document. I should note that this is dated December 8, 1969, which would indicate— having in mind the fact that briefing book is usually prepared about a week in advance, this was in about a week's preparation time—that the disagreement within the administration as of that late date on the very day of the press conference was still not resolved.

My recollection is based on previous practice, that this was brought to me prior to the press conference, Buchanan having already indicated, of course, in his December 5th memorandum, his view, which supported Mollenhoff's view, that we should take the other position. I think it reflects well on him, that in this particular addendum he presents both views, which was his practice usually.

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Excerpt From the Deposition of Richard Nixon (R. 604) Taken on February 7, 1980 [pp. 9-16]

[9] THE WITNESS: Because of Mr. Prettyman's very good cross-examination previously, I have finally begun to separate these two periods in time, which is difficult, four years elapsing between the 1969 period and the '83 period—

MR. MORTENSON: '73.

THE WITNESS: We do go on, don't we? I hope the case isn't still before the courts in '83. Could be.

MR. VON KANN: Stan, these documents you just itemized, do I understand the representation is they were shown to Mr. Nixon in preparing for this deposition today?

MR. MORTENSON: Yes.

BY MR. MORTENSON: Q. Now, from your examination of these documents, Mr. President, would you tell me whether you have any additional recollection now concerning what you did in connection with the Fitzgerald matter following the press conference of December 8th, 1969, in which you were asked a question that involved a reference to Mr. Fitzgerald? A. Well, not having any independent recollection of what occurred 11 years ago, based on looking at the notes of Mr. Haldeman, Mr. Ehrlichman and the other memoranda that have been introduced as exhibits, my recollection as refreshed would indicate the following items: The day following the press conference where Miss McClendon asked the question and I said that I would look into the matter, Mr. Haldeman's notes indicated, and my memory being refreshed [10] would verify this, that I raised the problem with him and apparently suggested that a position be found for Mr. Fitzgerald in the Bureau of the Budget. The following day after that Mr. Ehrlichman's notes indicated that the same matter was raised with him.

I should point out, it was my custom, quite often, not to stop at raising matters with one person, but to raise them with others as well who might have similar responsibilities.

Then approximately a week or so afterwards—I can't pinpoint the date—during the period of the budget review, which, as all of you know, takes place in the month of December, in one of the regularly scheduled meetings with Mr. Mayo, the then Director of the Budget, notes on that meeting that were made and which have been shown to me refreshed my memory that I raised the problem of Mr. Fitzgerald with Mr. Mayo and asked that he look into the matter. I cannot recall exactly what the conversation was. I would, however, say that the notes generally have been accurate when I have examined them in this matter.

Then thereafter, shortly before Christmas, a few—

Q. Let me interrupt you just a minute. A. Surely.

Q. Do you recall when, after the meeting the first time that you can recollect talking with Mr. Mayo about [11] a position for Fitzgerald in the Bureau of the Budget, did you discuss the matter with Mr. Haldeman?

MR. VON KANN: Objection. Leading. A. Well, after I had discussed the matter with Mr. Mayo, my recollection, based on having seen documents since then, is that I at least informed Haldeman, who was not present at the meeting, of what I had done.

Let me explain the process. Mr. Ehrlichman, who was in charge of economic, or I should say yes, economic matters and domestic matters, would be present at a budget meeting. It was not Mr. Haldeman's practice to sit in on budget meetings. And he as Chief of Staff, it was always my custom in my morning meetings with him to inform him if actions had been taken. And particularly in this case where I had previously raised the matter with him, it would be, of course, understandable that I would inform him of what I had done with regard to Mr. Mayo.

Q. All right. Now, going beyond this mid December part, did you subsequently have any conversation with Mr. Mayo concerning Mr. Fitzgerald? A. Again, based on the notes of meetings, a budget meeting that was taken shortly before Christmas, Mr. Mayo and I discussed the matter. Mr. Mayo indicated in that meeting that, first, he did not have a super-

grade position which he could offer to Mr. Fitzgerald, which would be the only kind of a position that would be commensurate with Mr. Fitzgerald's [12] previous employment, and commensurate in my opinion with the kind of employment which he should have at this time.

And then he also objected to finding a position for him, clearly apart from the fact that he did not have a supergrade position, because, in his checking on the matter, he felt that Mr. Fitzgerald would be a pipeline for Mr. Proxmire, Senator Proxmire, directly into the White House, in view of the fact, of course, that the Bureau of the Budget is in the White House.

The notes—based on my reviewing the notes, I accepted Mr. Mayo's position on this. I was in a very difficult situation, incidentally, insofar as overruling him on the first point, because we were, at my direction, preparing a very austere budget for the Congress for the next year, and I had indicated very strongly to Mr. Mayo and everybody in the White House that the White House must set the example in not only not adding new positions but in reducing positions. And we were hoping that that would be an example for the rest of the administration to do likewise.

Consequently, Mr. Mayo's objection that he did not want to add a supergrade position was one that I could not with any enthusiasm overrule. However, while I do not have a—while I do not have a—have not seen a document that would bear out my next recollection, what I believe might have happened, rather than an independent recollection, it is my very strong belief that he did not drop the matter [13] there, and that I raised it again with Mr. Haldeman.

I base that on the fact that, as I testified previously last fall, when I saw the note in the news summary in the Chicago Tribune, from the Chicago Tribune editorial, when I said to Mr. Haldeman to check it again, that I would not have put that on there had I concluded from the conversation with Mr. Mayo just before Christmas that the matter was closed.

Thereafter the note in the news summary that I have previously testified about, I cannot at this moment recall Mr.

Haldeman's reaction except that there had to be a follow-up due to a—my having now seen a memorandum from the staff secretary indicating that Dr. Kissinger had responsibility in the matter or had looked into the matter and a notation on the staff secretary's weekly report to the effect that Fitzgerald—that no position had been found.

Let me explain: Dr. Kissinger would not have had any responsibility with the Bureau of the Budget. His responsibility would have been with the Defense Department or the State Department or some other department related to national security matters. And consequently—and again, at this point I am—I cannot be sure I have not seen a document indicating what I told Mr. Haldeman, if I told him something, which I believe I did, after the budget meeting.

I am convinced that, either as a result of a conversation with Mr. Haldeman after the budget meeting or as [14] a result of my notation on the news summary to which I have referred, that the matter then was taken up with Dr. Kissinger, with Dr. Kissinger and/or somebody on the National Security Staff, to see if Mr. Fitzgerald could find a position, probably in the Defense Department.

Q. Let me have the—

MR. VON KANN: Stan, I move to strike all of the answer after "I accepted Mayor's position on this," as nonresponsive.

MR. MORTENSON: Okay. Let me have that marked as Defendant's Exhibit 173.

(Document marked Defendant's Exhibit 173 for identification.)

BY MR. MORTENSON: Q. Mr. President, I put before you a document marked Defendant's Exhibit 173 and ask you to take a look at it, and if you can, identify it for us. A. Yes, I can identify this. This is a result of a practice that I had initiated after the first year in office of trying to follow up on requests that I had made to see whether action had been taken on them. It wasn't that I didn't have confidence in my staff; it was that I felt that I should know when the staff had followed up or when the staff had not, and the reasons for no doing so.

Now, by requests, such requests would be—would have been—and for example, during the week of January 26 to February 2nd, either requests that were made [15] orally in meetings with staff members or requests that were made by noting something on a news summary or requests that were made by memorandum that I would independently dictate or requests that were made by telephone, and the procedure—I would say based on the handwritten note on it at the top, "Good job, keep it up," this relates to the fact that this seemed to me to be a very complete follow-up of carrying out my directive, of keeping me posted each week on what had happened on presidential requests.

Q. Can you identify the handwritten material on the upper right-hand corner? A. That's my note. That's mine.

Q. Would you tell us what it says again? A. It says, "Good job, keep it up"

Q. Now, directing your attention to the second page of the document, do you recall—does the document refresh your recollection at all concerning anything having to do with Fitzgerald? A. Yes. Item ten relates to the Fitzgerald matter. It says, "Jeb Magruder's report on Mr. Fitzgerald is attached at Tab G. Dr. Kissinger feels no further action is necessary."

Q. Now, let me direct your attention to the next page of the document, which is a memorandum containing Mr. Magruder's name. Do you know whether you have ever seen that document before? [16] A. I have no recollection of having seen it, no.

Q. Do you know one way or the other whether it was, in fact, the attachment to the staff secretary's memorandum? A. No, I would not know one way or the other except that its being attached at this point would indicate to me that it had been attached to the memorandum.

Q. All right. A. I would not—. Let me say that I cannot say that I did not review it and I cannot say that I did. I should point out that in the mass of material that comes across—came across my desk, and of course the desk of any president, it was

generally my practice to read the cover memorandum, the summary, and seldom have the time to read the attached documents. To me the decisive thing in here: "Dr. Kissinger feels no further action is necessary."

Q. Okay. A. I had confidence in him and also his judgment.

Q. Now, let me put before you a document that has been previously marked as an exhibit in this case—the document is Defendant's Exhibit 112—and ask you if you recall seeing this document in preparing for this deposition? A. I think I've been asked about this before, but my answer now is the same as I assume it was then. I do not recall seeing it. I can't say that I didn't. I can't say that I did. And it would be very presumptuous for me to say that I could remember seeing a document 11 years after the

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Excerpt From the
Deposition of
James R. Schlesinger (R. 432)
[pp.4-8]

[4] PROCEEDINGS

Whereupon,

JAMES R. SCHLESINGER

was called as a witness and, having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANTS ALEXANDER P. BUTTERFIELD AND BRYCE HARLOW

BY MR. LANDMAN:

Q. Mr. Schlesinger, just for the record, would you please state your full name? A. James R. Schlesinger.

Q. Would you state what your position was in the government in the time period of November-December, 1969, to January, 1970? A. I was at that time Acting Deputy Director of the Bureau of the Budget.

Q. Mr. Schlesinger, do you know Mr. Fitzgerald? A. Excuse me.

It became the OMB in the summer of '70. It was the Bureau of the Budget.

No; I have never met Mr. Fitzgerald.

Q. Are you aware of who Mr. Fitzgerald is? A. I am.

Q. When did you first hear of Mr. Fitzgerald? A. I presume—and this is not direct recollection—I [5] cannot recall the time, but I was aware of his role in the C5A, whatever it was, the discussion of the cost overruns of the C5A before the—Proxmire's Committee.

Q. To the extent you can recall, what was the source of your knowledge of Mr. Fitzgerald? A. The press.

Q. While at the Bureau of the Budget, did you ever have any discussion with any individuals with regard to Mr. Fitzgerald? A. Yes, indeed.

Mr. Mayo came to me, the Director, came to me, and I wouldn't recall precisely when it was. It was the end of 1969 sometime. And he indicated that there was a desire of the part of the White House to place Mr. Fitzgerald some place Mr. Fitzgerald some place other than—find a position for him outside of the Department of Defense, if I recall, outside of the Air Force. I think he was with the Air Force at the time; that it was suggested—it had been suggested by somebody over there—and I can speculate on who, because we had the same contacts all the time in the White House—and it was suggested that he be brought into the Bureau of the Budget.

Mr. Mayo asked my advice on the subject, asked me to reflect on it.

As I recall, I gave him my advice immediately; that it would not be a good idea; but I did reflect on the subject [6] and went back to Mr. Mayo.

Q. Why did you believe it not to be a good idea? A. For a number of reasons.

In the first place, I did not think that the Bureau of the Budget should be a receiving ground, as it were, for what were regarded as the problems of other agencies. The Bureau of the Budget had a lead staff that was quite cohesive. Given Mr. Fitzgerald's reputation as a source of information to Capitol Hill, and to Senator Proxmire specifically, I thought that it would be a disruptive factor in the operations of the Bureau of the Budget.

In addition to that, the Bureau had only a limited number of slots. I believe—and somebody can give me the information on this—I believe that Mr. Fitzgerald was a supergrade or we would have had to provide a supergrade slot. We had a limited number of slots.

The Administration at that time was intending, indeed, was engaged in the attempt to reduce government expenditures in government personnel. My recollection is at that time that the Bureau of the Budget itself was taking some reductions, so that put an even greater downward pressure on the availability of slots. And under those circumstances, I thought it would not be wise.

Let me say in passing that the notion was that Mr. Fitzgerald be brought into the Bureau of the Budget to work [7] on something other than the defense area. The suggestion had been that he be brought in to work on something other than the defense area; that is, he be brought in to work on non-defense work.

Given the structure of the Bureau of the Budget, he would have been forced—would have required forcing him down the teeth, as it were, of one of the division directors or else establishing some kind of floating spot outside of the existing divisions. I thought that the former would itself create some problems, some problems of public position, and in general, I just did not think it was a very good idea.

Do you want me to go on?

Q. Yes. A. This is recall.

I believe that I went back again to Mr. Mayo some days later and reiterated after two or three days reflection on it, whatever it was that, indeed, that would not be a good idea. And I believe I stated that more forcefully than I had on the first occasion.

Mr. Mayo accepted those judgments, and he took it from there. I do not know the details of his conversations across the street in the White House; but in the course of a conversation weeks later, if I recall correctly, he just mentioned that the issue seemed to have gone away. So that presumably, the reluctance of the Bureau of the Budget to [8] provide a supergrade for Mr. Fitzgerald was sufficient to persuade those in the White House who had had this idea not to reiterate it or not to carry it forward any longer.

Q. Did you have any conversation with Mr. Harlow at that time, or any time, with regard to Mr. Fitzgerald? A. Let me say that I knew Bryce Harlow moderately well, just moderately well. I had occasional meetings with him with regard to legislation.

The answer to the specific question is, no, Mr. Harlow—I never had a conversation with Mr. Harlow on this subject. As a

matter of fact, I had no conversation with anybody from the White House, on staff, on this subject.

A. I believe you stated that you learned of an effort by the White House—A. Let me say I was just as happy that Mr. Mayo carried on those conversations and I did not have to get involved and that the subject just seemed to go away.

Q. Thank you.

With regard to your discussions with Mr. Mayo, did Mr. Mayo agree with your assessment? A. Yes, sir.

Q. believe that you stated in your answer that you became aware of the fact that the White House was attempting to find Mr. Fitzgerald a job outside the Department of Defense.

* * *

Excerpts From
The Deposition of
Robert C. Seamans, Jr. (R. 334-35)

[pp. 2-79, 2-114 to -117, 2-124, 2-134, 2-142 to -143; 3-99 to102, 3-110 to -112, 3-188 to -203, 3-213 to -216, 3-219, 3-226 to -227, 3-234, 3-240 to -243]

[2-79] what there is there, it is clear, isn't it, or of that much of the exhibit, that if this reorganization were put into effect the position of Deputy for Management Systems would no longer exists? A. Yes. Yes, there is no reference to Deputy for Management System on these two pieces of paper.

Q. And didn't you, in fact, come to know in early May 1969 that Mr. Nielson had developed a formal written reorganization of his office; which reorganization, if implemented, would eliminate the position in which Mr. Fitzgerald was then employed? A. I was familiar with his views. A new Assistant Secretary of the Air Force of Financial Management was about to be installed. I was making sure that the new Assistant Secretary had all the information from all possible sources as to the situation and was going to await Mr. Schedler's views on the matter after he became Assistant Secretary and had a chance to carefully study the testimony.

Q. That's not responsive to my question, so let me state that again. Listen carefully. Isn't it a fact that in early May 1969 you came to know that Mr. Nielson had developed a

* * *

[2-114] logs and find the specific place, and I'm not sure I could identify it if I did.

Q. Now, sir, can you please tell us, as accurately as you can now recall, everything that you said to Mr. Harlow and everything that Mr. Harlow said to you during the course of this telephone call on May 9, 1969. A. First, let me say that at this time we had not decided on a course of action, but we needed an assessment of the situation on the Hill if we were to make a change in the management arrangements in the Office of Financial Management. And it was on that basis that Mr. Laird asked me to call Mr. Harlow.

Q. Let me ask you one thing. I don't want to interrupt.

MR. NIGHTINGALE: Excuse me. I think you should let him finish, Curt.

MR. VON KANN: I will, but I think it will save time if I may ask a question about a statement he just made; and then I'll let him complete his answer.

A. All right.

Q. When you say about the reorganization of [2-115] the office and getting an assessment, was that specifically an assessment of what the impact would be of a reorganization that resulted in the abolition of Mr. Fitzgerald's job? A. Yes, it was.

Q. All right, sir. I'm sorry to interrupt. Please continue. A. That's perfectly all right.

And Mr. Laird asked me if I would make the call. I normally did not have contact with the White House. These matters were normally handled out of Mr. Laird's office, but he felt that I was in a better position to discuss all the aspects of the reorganization with Mr. Harlow; and so he asked me to make the call.

I don't remember the details of the conversation. I do remember that I acquainted him with the background. I reminded him of the relationship of Mr. Fitzgerald to the C-5 and the testimony that had occurred during the previous Administration and asked him for his assessment of the waves that might occur on the Hill if we were to make that change.

Q. Now, what do you recall Mr. Harlow saying [2-116] to you in response to that? A. Well, here's where I'm really not sure exactly as to what he said and what was said somewhat later in the day.

He said he would. I know he said he would have to look into it and that he would either call me back or I would get a call from someone else in his office.

Q. All right, sir. Let me ask you, in that connection, to look at the log entry on May 9, 1969, for 4:15 p.m. showing a telephone call with Lamar Alexander—White House phone.

Do you see that, sir? A. Yes.

Q. Now Lamar Alexander was one of his deputies wasn't he, Harlow's deputies? A. Yes.

Q. Does that help you refresh your recollection at all that perhaps Mr. Alexander got back to you later in the day? A. I'm certain that is the case.

Q. Let me ask you, then, if you can do this.

MR. NIGHTINGALE: Excuse me. I think you interrupted him there. As long as he will be [2-117] allowed to finish.

MR. VON KANN: He will, indeed. I just want to make sure he understands the scope of my question.

Q. With those two entries in mind—the first call at 1:41 Bryce Harlow—White House phone, and the second call 4:15 Lamar Alexander—White House phone—try to tell me, as best you can, what Mr. Harlow told you in the first phone call and what Mr. Lamar Alexander told you in the second call. A. All right. Now, I really have difficulty differentiating between the two, but the substance of what was said by them was that this was a very sensitive item on the Hill and that it would be their recommendation that we not proceed to make such a change at that time.

Q. All right, sir. Now, let me ask you a couple of questions about the mechanics of the phone calls. A. All right.

Q. The first phone call to Bryce Harlow which is listed 1:41 has the symbol TC-o, which I understand to be the symbol for telephone call outgoing; correct?

* * *

[2-124] A. We were really asking for his personal assessment. We were definitely not asking him to take a sample of opinion at the White House, but just from his own standpoint working with the Congress what would be the implications of such a move.

Q. You knew, did you not, sir, that if the response came back negative from Mr. Harlow's office you weren't going to go

forward with this move; true? A. No. I knew that if it came back with a positive or negative this would be an input in my view of what we should do and Mr. Laird's view, that I would take this as one piece of information that we would use in the Department of Defense in making our decision.

Q. Now, sir, I would ask you to look at Plaintiff's Exhibit 94, your oral history, and in particular on Page 11. Please read the first full paragraph on that page, read it to yourself, and then I want to ask you a few questions about it. A. You're talking about the last paragraph?.

Q. On Page 11 it begins: "I thought at that time . . . " A. Yes, okay. (Examines documents) I've read

* * *

[2-134] question of timing?

MR. NIGHTINGALE: I'll object to that. You've tried to put the witness' answer in other words. I think the answer speaks for itself, and I didn't understand the answer as being that. I'll object to that for lack of foundation as being an improper characterization.

MR. VON KANN: I'll rephrase the question, but I think it is proper.

Q. The response that came to you from Mr. Harlow's office was that this is not a proper time, this is not the best time to do it rather than this is not a proper thing to do, you shouldn't do it? A. We didn't ask him to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress.

Q. Now, I want to return to a question I asked earlier, and I do not believe it was answered. And that is when Mr. Harlow said or Mr. Lamar Alexander on his behalf said this is not the best time to separate Fitzgerald, was there a discussion in that phone call about, Well, when can we do it, when would be a permissible time or a good time to separate Fitzgerald?

* * *

[2-142] White House for the breakfast on May 15, 1969? A. Yes, I do.

Q. All right, sir. Tell us, as fully as you can now do so, everything that Mr. Harlow said to you and everything that you said to Mr. Harlow while you were at the White House on May 15, 1969. A. Well, what I remember is that perhaps it was after a service in the East Room. Anyway, we were over in the West Room where there were, as I remember it, tables set up full-face style; and people were milling around chatting with each other. I remember Bryce Harlow and I coming together by happenstance and his asking me how things were going in the Air Force and about the performance of Mr. Fitzgerald and the actions that we were taking. And at that time I gave him an update on where we stood, and I don't remember his giving me any advice or counsel. I just remember it as a time when he asked me for an update.

Q. Well, what did you say to him by way of an update? A. Well, I can't remember what I specifically said, but by that time I had reported back to Mr. Laird both on the conversation with Harlow as well [2-143] as on the conversation with Mr. Hampton of the Civil Service Commission; and we decided that—he decided, Mr. Laird decided, that he would try to find an opportunity for Mr. Fitzgerald somewhere else in the Department of Defense.

MR. VON KANN: I'm going to mark the next one as 127 which was previously marked as an earlier numbered exhibit. Unfortunately, I don't have the number; so again, he'll have a duplication. (Document marked as Plaintiff's Exhibit 128 for identification)

Q. Dr. Seamans, I will represent to you that Plaintiff's Exhibit 128 has been authenticated earlier in the deposition by Mr. David Wilson, who was then an assistant to John Dean at the White House, as being notes he made in or about, on or about January 31, 1973, when he was attempting to reconstruct what contacts had occurred between the Defense Department and the White House with regard to the Fitzgerald matter. And I want to direct your attention and ask you to read to yourself the entry that appears midway down the first page by the date May 15. A. (Witness complies)

* * *

[3-99] Q. Were these December 5, 1969, calls regarded by you or your staff as sensitive? A. Not to my knowledge. I mean no more than any other calls.

Q. Well, I wonder if you know why the author specifically said, "We will have to discuss both of these calls," these December 5 calls. There's no reference to any other discussion. A. I can't answer that.

MR. NIGHTINGALE: Objection. Excuse me, Dr. Seamans. First of all, I think there's a lack of foundation there. Second of all, I would just like to state—without wanting to characterize the document—that I don't necessarily concede that both of these calls refer to any two particular calls in the document, Curt.

MR. VON KANN: All right.

Q Dr. Seamans, let me ask you to do this if you would. Can you recount for us, as accurately and as fully as you now can recall, exactly what was said by you and exactly what was said by Mr. Mollenhoff?

Let's take that one, first, your December 5, 1969, telephone call with Clark Mollenhoff. [3-100] A. The issue that we were discussing—and the one that deeply concerned me, I've already mentioned just before the break—had to do with the possiblity that the White House would reverse the Air Force and the Department of Defense's decision to abolish Mr. Fitzgerald's job.

Q. Dr. Seamans, let me ask you to do this. I'm sorry to interrupt, but I think you're not being quite responsive. Rather than characterizing the call, I would ask you, to the best of your present recollection, to tell me what was said if you can.

What did Mr. Mollenhoff say to you? What did you say to Mr. Mollenhoff, as best you can recall it? A. I can't possibility give you a verbatim—

Q. No, I understand that. But, in words and substance, what did Mollenhoff say to you? What did you say to Mollenhoff?

MR. LANDMAN: I think that's what Dr. Seamans was doing. I think he was giving you, to the best of his recollection, what the substance of that conversation was.

Q. I don't mean to cut you off. What I want to ask you to do, Dr. Seamans, is, to the maximum [3-101] extent you can, simply recount the call rather than characterizing or concluding. I recognize you do not have a transcript and you can't give it to me verbatim; but, as best you can recall, I would like to know how it went.

Who spoke first? What was said? What did the other party then say and so on? A. Well, it had come to my attention that the, quote, While House was considering ordering the Department of Defense and the Air Force to reserve their decision.

And in the phone conversation, I expressed to Mr. Mollenhoff a very great, very strong objection to any such action being taken; and he, in turn, expressed to me his concern for the political consequences of continuing with the action that we had taken, the action to abolish Mr. Fitzgerald's job. He was not, in the conversation, ordering me. He was, you might say, threatening me.

He was telling me that the matter was being reviewed at the White House and that we are going to be told to change; and I was saying that it would be over my dead body that we would make any such change.

In talking about it now, I remember that [3-102] there had been an article in the newspaper—I think it was The Chicago Tribune—which had indicated that the White House was taking this under advisement and might or would probably ask or demand that the Department of Defense change its views because of the nature and so on of the action that we had taken.

And it was that article which I very much suspected had been leaked by Clark Mollenhoff that caused me to get extremely exorcised about the whole matter and led to my discussions with Mr. Packard and Mr. Harlow and Mr. Mollenhoff.

Q All right, sir. Now, I think I have perhaps taken these events out of chronological order; because as I look back on

your log for December 5, it says that you spoke to Mr. Harlow before you spoke to Mr. Mollenhoff.

And you've just said, sir, that this Chicago Tribune article led to your discussions with Mr. Packard and Mr. Harlow. A. Well I'm not sure that was the only article.

Q. As a stimulus? A. There was an article. I'm not even

* * *

[3-110] I realize that Mr. Packard was aware of the Fitzgerald matter, but I really cannot recall in detail conversations with him about Mr. Fitzgerald.

Q. Do you recall relaying to him your reaction to The Chicago Tribune article? A. I can't be positive that I did. I know that I was extremely upset that there was thought of action that would reverse the decision that we had made, and he would have been the one person that I would go to at that time since Mr. Laird was away.

Q. All right. Now, you did not speak to either Mr. Harlow or Mr. Mollenhoff on December 4; but you did speak to both of them on December 5, true? A. Yes.

Q. Now, the logs show that the first of those two that you spoke to was Harlow, correct? A. Yes.

Q. Can you tell me, as accurately as you now can, what Mr. Harlow said to you and what you said to Mr. Harlow in that telephone conversation on December 5, 1969? A. Well, my recollection is that I relayed to him my concern and the facts; that I was quite upset [3-111] on the matter; that he didn't, that he was really noncommittal; and that he didn't give me any indication that such a decision was going to be made in the White House to reverse the decision of the Department of Defense. That's all that I recall.

Q. Did he say that he would relay your concern on this matter to the President? A. Not to my recollection.

Q. Did he express the view that the decision by the Department of Defense should stand? A. I don't remember him saying that, either.

Q. Was the result of the call totally inconclusive, or did he indicate he would do anything as a result of your call? A. I don't remember.

Q. When you say you relayed to him your strong concern, can you tell us as accurately as you can recall what you said by way of your concern on that matter? A. Well, I can't really recall the exact conversation, but I referred to information I'd received that the decision might be reversed. I believe I referred to the article in the newspaper and told him that it would be most inappropriate, in [3-112] my view, if decisions relating to management of the Air Force were reversed by actions taken in the White House.

Q. Did Mr. Harlow express any view on that one way or the other? A. I don't remember.

MR. VON KANN: Let me ask the court reporter to mark one more document. This will be the last before the break.

(Document marked as Plaintiff's Exhibit 141 for identification)

Q. I show you, sir, a document that has been marked Plaintiff's Exhibit 141 and ask if you have ever seen that before. A. No, I have not.

Q. Did it ever come to your attention that Secretary Packard telephoned Mr. Harlow concerning the Fitzgerald matter? A. I really don't remember.

Q. Do you recall in your discussion with Secretary Packard recommending to him that he contact the White House and express any views on the Fitzgerald matter? A. I told him the facts, and he agreed with me.

* * *

[3-188] MR. NIGHTINGALE: Back on the record.

CROSS EXAMINATION

BY MR. NIGHTINGALE:

Q. Dr. Seamans, did you sign the order which directed that the Financial Management Office be reorganized? A. I'm not

sure whether I did or not. I believe I signed the order that caused the abolition of Mr. Fitzgerald job.

Q. When did you do that? A. That was on the 3rd of November, I believe.

Q. Was that your decision to abolish Mr. Fitzgerald's job? A. Yes, it was.

Q. How did you go about making that decision? A. Well, as we've been discussing here, it was a lengthy process of gathering information from within the Department of Defense and from sources outside the Department of Defense, including asking the views of Mr. Harlow six months earlier or so. And finally it led to a recommendation from Mr. Schedler for the reorganization.

I should also say that I kept Mr. Laird and his deputy, Mr. Packard, informed throughout and had [3-189] taken any actions that they required prior to making the decision.

Q. Did you approve the recommendation that Mr. Schedler made in the form that it came to you? A. Yes. I did not change his recommendation.

Q. Did you involve yourself in the details of the process that led to his formulating that recommendation? A. I did not go into as much detail as he did on the specifics of each one of the functions in the office; but I did, in a general way, review with him—as I had reviewed prior to the time that he became the Assistant Secretary with Mr. Nielson—the responsibilities of the office.

So I was generally familiar with the functions as well as with the changes that he wished to make.

Q. Did you retain authority to approve, disapprove, or alter Mr. Schedler's recommendation? A. Yes. Mr. Laird stated on a number of occasions that he had asked me to review the management of the weapon systems acquisition procedures in the Air Force and, in particular, a review of the Financial Management Office. He had [3-190] stated that this was my responsibility and that he would support my decision.

Q. When you signed the order that abolished Mr. Fitzgerald's position, were you directed to do so by anyone? A. No, I was not.

Q. You weren't directed to do so by Mr. Nixon? A. No, I was not.

Q. By Mr. Butterfield?

MR. VON KANN: Well, just a minute. I'm going to object to leading questions. The witness stated he wasn't directed to do so by anyone, and it's redundant to give a lot of names. And, number two, it's leading.

Q. I'll rephrase the question and move on. Let me say where I stand right now.

When you approved the reorganization of the Financial Management Office, why did you do so? A. Well, the primary reason for making the change was really on two counts: One to improve the efficiency of the office; and the other was that it was part of a larger goal of reducing the number of personnel in the Secretariat by the order of 10 percent.

[3-191] Q. When you approved the reorganization, you were aware, I believe you've said, that Mr. Fitzgerald's position would be abolished. Is that correct? A. Yes, that's correct.

Q. You were also aware that some Congressmen had expressed an interest in Mr. Fitzgerald and that he had received public attention, is that correct? A. That is correct.

MR. VON KANN: Let me just note an objection, continuing objection to save time, to leading questions. This is a peculiar deposition in the sense of plaintiff's notice to this deposition, because they were advised that one or more of the defendants would be relying on the testimony of Dr. Seamans to support a motion for summary judgment. And to that extent we, in effect, have been conducting cross examination of testimony that we haven't yet seen.

Dr. Seamans was, of course, a subordinate of and associate of Defendant Nixon during the events in question. He's indicated that he had been told he might be asked to supply an affidavit to the defendants in this case. He's testified that he met [3-192] on two occasions with counsel for Defendant Nixon.

And, therefore, I submit that the record shows that Dr. Seamans is the witness of one or more of the defendants

including Defendant Nixon and that it is not appropriate or permissible for Defendant Nixon's counsel to conduct the examination of Dr. Seamans by means of leading questions.

But I will simply state that objection once as to all leading questions for the balance of the day and not repeat it each time.

MR. NIGHTINGALE: I think that's a good way to proceed. I, just so the record is clear, don't subscribe to that rationale, as I expect you expect that I wouldn't. But I agree that, to expedite things, a preferable way of going forward would be for you to have a standing objection to leading questions; and I recognize it and note it.

Q. Why did you approve the reorganization of the Financial Management Office knowing that it would result in the abolition of Mr. Fitzgerald's job? A. Well, as I've stated on a number of occasions, I believe, including in this deposition, I did not feel that the Congressional interest and [3-193] so on gave Mr. Fitzgerald immunity from such action. And in addition, as I've stated here, I had very real concerns about Mr. Fitzgerald's capability to work effectively within the Air Force.

It's not the primary reason for the decision, but this is in response to your question.

Q. That was your decision at all times, however? A. Yes, that is correct.

Q. Did former President Nixon ever instruct you to take any action whatsoever with regard to Mr. Fitzgerald? A. No. I never had any discussion with President Nixon with regard to Mr. Fitzgerald.

Q. Was there anyone who represented to you that he was acting on Mr. Nixon's behalf or as a representative for Mr. Nixon on who instructed you to take any particular action with regard to Mr. Fitzgerald? A. No, there was not. Quite the contrary. It appeared at one time that there was some question as to whether the White House might attempt to reverse our decision.

Q. Were you aware of whether Mr. Nixon had any [3-194] position whatsoever with regard to Mr. Fitzgerald in the Fitzgerald matter, generally? A. No, I was not.

Q. I'd like to refer you to your log of March 5.

MR. LANDMAN: '69?

MR. NIGHTINGALE: 1969.

Q. I direct your attention to an entry at 9:40 to 11:02, departed for White House for Goddard Trophy presentation to Apollo VIII astronauts.

Can you describe, if you remember, what that function consisted of, please?

MR. VON KANN: Let me object here. I certainly have no serious problem with the question, except I know that I specifically asked Dr. Seamans about that entry and he did describe it as a ceremonial function for Scott or Carpenter or somebody who had just walked on the moon or something. So it's already in the record, I believe; but you're free to go ahead and explore.

A. As I indicated previously in the deposition, this was a ceremony at the White House for the astronauts. Let's see. Borman was the lead, and Apollo VIII was the flight that went around the moon [3-195] on Christmas Eve.

It was a function with a large number of the Congress and the Administration present, and it was a kind of ceremonial function that often takes place at the White House.

Q. Was the President at the front of the room and behind a podium with chairs set out in front of him or something of that nature? A. Well, I don't now really recall the ceremony in detail.

Q. Did you have any occasion to speak to Mr. Nixon on that occasion? A. Not to my knowledge.

Q. I'd like to direct you to your log for May 15, 1969. A. May 16?

Q. May 15. There's reference at 8:30 to a breakfast at White House, slash, the President, et al.

How many people attended that breakfast? A. Well, this came up again earlier in the deposition. At that time I was not

really familiar—I don't remember. Apparently, there was some form of religious service. I do remember going to a few [3-196] at the White House where there would be—I don't know—several hundred people present.

Q. Did you have occasion to speak to Mr. Nixon at this breakfast? A. I don't recall.

Q. Did you speak with Mr. Nixon about the Fitzgerald matter at this breakfast? A. I don't recall that I did.

Q. Was there in any event, a large group there? Do you remember that? A. Well, the part that I remember more clearly than the ceremony in the East Room was the informal buffet breakfast afterwards where the people were invited to have juice and a danish and coffee, tea, and so on. And, again, I would guess there were on the order of a hundred, several hundred people present.

Q. I'd like you to refer to your log of May 16. At 1:39 there is an an entry there which refers to a conversation, Secretary Laird; and then the description that was given by the person who prepared the logs was re MOL meeting with, slash, the President and reorganization of FM Office as it relates to Dr. Seamans' conversation with Bryce [3-197] Harlow at White House.

Q. What was the MOL meeting with the President? A. Well, the MOL stands for Manned Orbital Laboratory, and this is a project that had been started by McNamara three or four years prior to '69 when I was in NASA. And it was a cooperative program with the space agency and managed by the Air Force. And at this time there was a question as to whether the Manned Orbital Laboratory would be canceled.

When I heard that this might be the case, I had asked prior to this time of Mr. Laird that he arrange a meeting for me to discuss the advantages and the reasons for continuing the project prior to any cancellation—I meant to say discuss it with the President prior to any cancellation—and the purpose of this phone call was to advice me that the meeting had been established; that I could bring with me General Stewart, who was the project manager; and that the Mr. Kissinger would probably be present.

Q. Was there any relationship in your mind between the Manned Orbital Laboratory and the Fitzgerald matter? A. Absolutely not. And I don't really recall [3-198] whether there was, in that same conversation, a discussion of my meeting with Bryce Harlow. It could have been. I just don't recall.

Q. I'd like you to refer to your log of May 17, 1969, the entry at 9:05 to 10:29.

MR. VON KANN: What was the date, please?

MR. NIGHTINGALE: May 17, 1969.

MR. VON KANN: And the time?

MR. NIGHTINGALE: 9:05 to 10:29.

Q. Was that the occasion of the MOL meeting which you described? A. Yes, it was.

Q. Did you discuss the Fitzgerald matter with the President at that time? A. No, I did not. I can remember the meeting very clearly, because it was a matter of considerable importance; and it was one of the few opportunities I had for substantive conversation with President Nixon.

Q. Did Secretary Laird explain to you why he suggested that you talk to Bryce Harlow in early May of 1969? A. I don't recall. I can speculate, but I don't remember.

[3-199] Q. When you spoke to Mr. Harlow, were you seeking advice as to the reaction on the Hill to reorganization of the Department of the Air Force that would result in the abolition of Mr. Fitzgerald's job?

MR. VON KANN: Well, I do have a continuing objection. I would like you to know that that is an especially leading question, and my objection is doubly significant on that one.

Go ahead. I won't do it every time, Steve.

A. My recollection is that I did not discuss with him the matter of management and reorganization but just the situation as it related to Mr. Fitzgerald, the question of Congressional sensitivity to an interest in Mr. Fitzgerald, and the question of what his views would be on Congressional reaction should Mr. Fitzgerald be separated from the Air Force.

Q. I'd like to rephrase the last question if I could.

What sort of advice were you seeking from Mr. Harlow? A. I was seeking for myself and Mr. Laird his assessment of the impact, potential impact, of [3-200] separation of Mr. Fitzgerald from the Air Force; impact on, possibly, legislation.

Q. Was the response you received from Mr. Harlow in terms of instructions, directions, advice, or something else? What was it phrased in terms of?

MR. VON KANN: What were the other alternatives? You recited instructions . . .

MR. NIGHTINGALE: Instructions, directions, advice, or something else.

A. It was in the form of—and we've said several times in this deposition—of advice that, yes, that there were members of Congress who took considerable interest in Mr. Fitzgerald; that there was critical legislation; and that it would not be a good time to make a change of the sort I indicated.

Q. Did Mr. Harlow indicate that he was speaking for Mr. Nixon or on Mr. Nixon's behalf? A. As I remember it, Mr. Nixon did not come into the conversation.

Q. I'd like to refer you to Plaintiff's Exhibit 94, which I understand you've identified as a transcript of an oral history that you had a hand in. Specifically, Page 11. I'd like you to look at the paragraph that occupies the bottom of the page[3-201] there.

A. (Examines document)

Q. Now, the material in quotation marks—is that a direct quote of what Mr. Harlow said to you, or is it not a direct quote? A. Well, first of all, this was dictated in March of 74 some five years after the fact; and it really should not have been shown in quotes because I didn't write down, didn't have a transcript of our conversation. So I really said this more in colloquial terms; and it really should say, I guess, He said that I could see you have a problem. I don't remember now and I doubt that I could in '74 remember exactly what his words were.

Q. Could you tell us what the sense of the words were?

MR. VON KANN: Let me ask. "Sense of the words" that appear on Page 11 of Plaintiff's Exhibit 94?

MR. NIGHTINGALE: I'm sorry. I'd like to rephrase the question. I appreciate that.

Q. In the sense of the words that were used in the actual conversation itself with Mr. Harlow. A. Yes. I believe you're asking me what was [3-202] the sense of the sentence that's in quotes on Page 11.

And my answer would be that I've already discussed this, the second half of the sentence; namely, that this would not be a good time to separate Mr. Fitzgerald for political—the political situation is such on the Hill that it would not be a good time to separate Mr. Fitzgerald. And the, "Well, I see you've got a problem" indicated that he was sympathetic to our management problem.

Q. Did you draw any implication from Mr. Harlow that he was expressing a favorable view on your abolishing Mr. Fitzgerald's position later? A. No. He was quite noncommittal, I'd say, to the best of my recollection.

Q. When you spoke to Mr. Harlow in November, had you already executed the order to abolish Mr. Fitzgerald's position? A. Yes. The logs indicate that the order was signed on November 3; and the conversation with Mr. Harlow was, I believe, a day later.

Q. Was that decision, was your execution of that order in any way tentative on November 3?

[3-203] A. No. It was part of an overall plan of the Air Force to have a reduction in Force to a considerable pro position, namely, 10 percent of all part of a total plan.

Q. The decision was made as of that point? A. The decision had been made by the Air Force at that point.

Q. What were Mr. Lang's responsibilities within the Department of the Air Force? A. Well, first of all, he was in what we call the Secretariat. That was the civilian element

within the Air Force located in the Pentagon and included myself and the other Secretaries of the Air Force, general counsel. And there's a group of about four to 450 people.

And his responsibility was for the administrative functions of that group which included personnel administration but also included such mundane items as office allocation and telephone and all of the things that it takes for this group to work effectively.

Q. Did he report directly to you? A. I believe that he did.

Q. Did he keep you apprised of all the matters

* * *

[3-213] It appeared that there had actually not been an investigation, but it clearly confused the issue to have such a file.

Q. That was after you had signed the order abolishing Mr. Fitzgerald's position, is that right? A. Yes, that's right. That was several weeks afterwards.

MR. VON KANN: Just so the record is clear, what was the anticedent of that in that question what you said that was?

MR. NIGHTINGALE: Excuse me. I'll rephrase the question so there won't be any confusion.

Q. Your conversation with Congressman Moorehead occurred in the middle of November, is that right? A. I forget. I keep forgetting the date of that hearing; but it was the day before the hearing in front of the Joint Economic Committee, the committee that was chaired by Senator Proxmire.

Q. Okay. When you talked to Bryce Harlow on November 4, how did you describe the reorganization that you had previously approved? A. I don't really remember.

Q. Do you remember whether you explained the [3-214] purpose to Mr. Harlow of the reorganization? A. Well, it was for purposes of information, and I must have advised him that that involved abolishing Mr. Fitzgerald's job and that it was a reorganization to do two things: to reduce the cost, cut down the number of people in the Secretariat. and to improve efficiency.

Q. Is that the way you described the reorganization to Secretary Laird? A. I guess I have to say I don't know what you're referring to there—meetings or . . . But in general, yes, that was what I would have discussed with Mr. Laird.

Q. Did you ever indicate to Mr. Harlow that you were abolishing Mr. Fitzgerald's job because of his testimony on the C-5A? A. As I have said, I don't really remember the details of the conversation; but as I've indicated here we did not abolish his job for that reason.

Q. You don't remember telling Mr. Harlow that you were abolishing Mr. Fitzgerald position because he had testified regarding the C-5A? A. I don't remember discussing that matter with him, no.

[3-215] Q. And you didn't abolish Mr. Fitzgerald's position because of his testimony on the C-5A? A. This is a matter we've discussed here at great length, and I will just say once more that—as I said that at the end of, I think, our last session we had the day before yesterday, that or maybe some other time when I was here—at any rate that was not a factor that concerned me, the fact that certain testimony had been taken in the previous Administration.

Q. Where were the Civil Service Commission hearings taking place in 1973? A. In the Civil Service building. I can't remember the exact address; but it was about two or three blocks to the west of the White House, a couple of blocks north of Constitution Avenue.

Q. Am I right in understanding your testimony that you ate lunch at the White House during breaks in the first two days of your testimony? A. Yes, I think the log shows that I did and also maybe in the three days. I did have limited White House privileges as Secretary of the Air Force. It was possible for me to use the White House Mess; and it was very, very convenient to the hearing. I [3-216] didn't care to go take the time to go back to the Pentagon, nor did I want to suddenly get emersed in a lot of other matters. I wanted to have a chance to relax.

Q. Do you remember meeting anyone in the White House Mess on January 30? That was the first day of your testimony.

MR. VON KANN: Asked and answered.

A. My only recollection of any discussion there in the White House Mess was the one we've gone through here with Mr. Dean.

Q. Did you tell Mr. Dean that, based on what you had heard of the President's press conference, the President had to be mistaken? A. Yes, I believe I did. Again, it's hard to remember the details of a five-minute stand up conversation on the steps leading out of the Mess.

Q. Dr. Seamans, did you prepare your own correspondence in response to inquiries of Congress directed at the Department of the Air Force? A. No. There were a very large number of inquiries. They'd go directly—at least in most cases, they would go directly to Legislative Liaison Congressional Affairs, whatever you want to call it,

* * *

[3-219] job? A. Well, I felt basically that the White House shouldn't meddle in the affairs of agencies and departments of Government; meddle in the sense of getting into personnel actions, whether it be either the hiring of people or reorganization or whatever it might be. And, in particular, that this had been part of a total, important plan of the Air Force; and, having made the decision on what I felt was good and satisfactory and reasonable grounds, I didn't want to see it changed.

Q. Do you feel that you had more information on the factors that went into the reorganization than they did? A. Well, that, I guess, is the reason that I'm a believer in reasonably decentralized management—that those who are close to the personnel are bound to know more about the facts, and they're the ones that ought to make the decision.

Q. I'd like to refer you to Plaintiff's Exhibit 127 now. I'd like you to look at the bottom of the column that appears under the headline, "Official Score Reporting on C-5A Overruns. A. On Page 3 or—

* * *

[3-226] of his assistants?

A. I don't remember.

Q. Did you indicate to Mr. Dean that you thought the President made a mistake? A. Yes, I believe I did. I would have been remiss if I hadn't.

Q. Do you know what position Mr. Buzhardt was in before he moved over to the White House? A. Yes. He was the general counsel for the Department Defense.

Q. Have you had a chance to consider when Mr. Buzhardt changed jobs? A. No, I have not.

Q. Do you know whether he was at the White House prior to your Civil Service Testimony? A. No, I really don't know. I think there's some relationship between Mr. Dean leaving the White House, isn't there, and Mr. Buzhardt being over there? I'm not really sure of that. That's speculation.

(Discussion off the record)

Q. Dr. Seamans, did you consult with anyone at the White House in preparation for testifying before the Civil Service Commission? [3-227] A. Not that I can recall.

Q. Did anyone instruct or advise you that you should refuse to speak about conversations you may have had with White House staff members? A. No.

MR. NIGHTINGALE: I believe that's all I have.

(Discussion off the record)

CROSS EXAMINATION

BY MR. LANDMAN:

Q. Dr. Seamans, just picking up on something that Mr. Nightingale just asked you about, would you state whether or not you have ever had any doubt as to whether former President Nixon misspoke on January 31, 1973, when he said,

without characterizing exactly what he said, that he approved of the decision to abolish Mr. Fitzgerald's job?

MR. VON KANN: Well, I object; and I'll just have a standing objection to any leading questions from Mr. Landman of his own client. But go ahead.

MR. LANDMAN: I don't think that's leading.

MR. VON KANN: I thought it was, but let

* * *

[3-234] qualifications.

Q. Dr. Seamans, would you tell me whether or not you rejected Mr. Nielson's proposal to reorganize the Office of Financial Management? A. Yes, I did. And the reason was that we were planning to bring in a new Assistant Secretary for Financial Management, and it seemed best to have the new Assistant Secretary review the organization and come in with recommendations for possible changes in procedure and organization.

Q. Dr. Seamans—A. Excuse me. I would say because the new Assistant Secretary would be the one who would have to take the responsibility for the office, and it only seemed proper that this individual would be involved in any changes that were made.

Q. Dr. Seamans, based on your May 9, 1969, conversation with either Mr. Harlow or Mr. Alexander, was it your impression—I'm sorry. Strike that.

Based on your conversation with Mr. Harlow on May 9, 1969, was it your impression when Mr. Harlow said he would get back to you that he was going to check with people on Capitol Hill or that he was going to check with people in the White House

* * *

[3-240]Q. My question to you is whether you have ever learned, whether or not you have ever learned, that anyone on the White House staff caused that file to be compiled. A. That

never to my knowledge, never came to my attention. The first time that that thought has crossed my mind.

Q. The first time that thought has crossed your mind is when? A. Now.

Q. Okay.

MR. VON KANN: When you suggested it.

Q. Dr. Seamans, have you ever learned of any contact between Mr. Butterfield and the Air Force or Department of Defense with regard to Mr. Fitzgerald? A. No.

Q. Would you tell me whether or not you've ever learned of any action by Mr. Butterfield which influenced how Mr. Fitzgerald was treated by the Department of Defense or the Air Force? A. The first time that I knew or learned that Mr. Butterfield had, in any way, been involved in the matters of Mr. Fitzgerald was when I read the partial transcript of the Nixon tapes or saw a memo.[3-241]I forget which it was. Maybe it was a memoranda or something from the White House, but I knew nothing about it when I was in the Air Force.

Q. I'd like to show you, Dr. Seamans, Plaintiff's Exhibit 71 and just ask you to read the first paragraph. Or maybe you don't need to read it; you might be familiar with it now.

My question is would you tell me what your impression was of what Dr. Brown—and I'm only asking for your impression—of what Dr. Brown meant in terms of Mr. Fitzgerald's unacceptable practices.

MR. VON KANN: Well, let me object to that. The witness has previously testified that that exhibit is, to the best of his recollection, an accurate summary of his meeting with Dr. Brown with one exception which he explained. I don't see how the witness can explain what Dr. Brown meant better than Dr. Brown has.

MR. LANDMAN: Only his impression of what Dr. Brown meant, what he viewed Dr. Brown meant when he used those words or words to that effect.

MR. VON KANN: Okay. A. I can't of this date, of course, try to [3-242] guess what Mr. Brown had in mind; but I

know what my own reading of this means right now—that there is a time when decisions are being made, when you want the advocates of different viewpoints to present them vigorously and forcefully and clearly; and that's very appropriate, that is, before the decision is made. But you don't want public positions to be taken on from contrary standpoints after the fact in the public arena.

Q. This is my last question.

Dr. Seamans, would you tell me whether or not Mr. Harlow ever gave you any indication during the time period of your two May 1969 conversations with him—I believe May 9, 1969, and May 15, 1969—whether or not Mr. Harlow ever gave you any indication or advice as to what you should do in the future about Mr. Fitzgerald? A. As I've stated quite a few times here in these three sessions, to the best of my knowledge he did not make any recommendations as to the actions we should take; rather, he advised us of the sensitivity of the matter on the Hill and thought that it would not be in the Administration's best interest to take action at that specific time to [3-243] separate Mr. Fitzgerald from the Air Force.

Q. Thank you.

MR. VON KANN: Dr. Seamans, I have, hopefully, a quick follow up.

REDIRECT EXAMINATION

BY MR. VON KANN:

Q. Mr. Nightingale asked you about Plaintiff's Exhibit 76; and Mr. Nightingale asked you, I believe, if you knew what was the source of information contained in that document.

And I want to ask you if it might refresh your recollection that you compiled Plaintiff's Exhibit 76 upon reviewing Mr. Schedler's testimony before the Civil Service Commission. A. Of course, I was putting this information—there are several sheets that we've gone over here—together, and I had a great stack of data.

And I'm sure that in that stack there were a variety of notes; and I guess I had—I don't know. I don't think I used, as I said, my log; but I'm pretty sure that if you went through all the data in front of me you could pull this information out as to when I first met Schedler.

Q. No, sir, my question is more narrow than

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Excerpts From The Deposition of
Ronald A. Ziegler (R. 442)
[pp. 100,105-06]

[100] A. It is based upon the similarity of language and position, therefore, on my part.

Q. And nothing other than the similarity of language? A. Nothing other.

Q. You described for us your state of mind as to a Magruder memorandum that was shown to you. Do you have any—what was your state of mind, if any, concerning communications from Mr. Butterfield? A. Well, Alex was really not that big of a factor. He was a paper flow guy, and I had little contact with Butterfield, and he would not have been a primary source of information for me on press briefings.

* * *

[105] Write this. Would you explain very briefly what you meant by "natural" for Allen Woods to write this? A. Well, not only Allen, but members of the staff who—I guess—well, in reviewing the press conference, President's press conference from the—

Q. Can I help you? December 8, 1969? A. —December 8, 1969.

Q. Questioned by? A. Questioned by Sarah McClendon, he did not respond. I think there was a joke or something. That very likely would have been the reason why Allen would have written this, which would have been a natural course of events.

Q. Follow-up? A. Follow-up.

Q. I believe you testified that Mr. Butterfield was a "paper flow guy" to use your words. Are you aware of any usage of Mr. Butterfield by your staff, if there was any, to follow up on loose ends before a press conference in order to make sure that the administrative work was done, to make sure a position was taken on the matter? A. I'm not aware of that. It could have happened, but again, I don't believe Butterfield would have been an individual [106] that would have prepared substantive matters for a press conference.

* * *

Plaintiff's Deposition
Exhibit 4A

Congress of the United States
House of Representatives
Washington, D.C.

November 7, 1969

The President
The White House

Dear Mr. President:

The Defense Department dismissed a conscientious public servant when they fired A. Ernest Fitzgerald on November 4. Mr. Fitzgerald for the past four years has worked assiduously to reduce waste and inefficiency in weapon systems procurement, which annually consumes in excess of $20 billion of taxpayers' money. Defense Department officials have explained Mr. Fitzgerald's dismissal as an "economy move." What an incredible irony when a man who has identified billions of dollars of waste, is fired to save money. At best they have been penny-wise and pound foolish.

More than likely, however, the firing of this dedicated public servant was a punitive action—taken because he refused to knuckle under and rationalize the waste, inefficiency, and bureaucratic bungling he came across. It has been said that he who makes waves in the bureaucratic maze of the Pentagon will often drown in them. Unfortunately, this has been all too real in the case of Mr. Fitzgerald.

Honesty and candor exhibited by public servants without fear of reprisal must remain a keystone to good government. Therefore, we call upon the Administration to repudiate the type of punitive action that was taken against Mr. Fitzgerald and restore him to his former duties.

Sincerely,

WSM:ymm

Plaintiff's Deposition
Exhibit 12

THE WHITE HOUSE
Washington

January 20, 1970

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: MR. HALDEMAN
FROM: ALEXANDER P. BUTTERFIELD /A/
RE: A. Ernest Fitzgerald

I may be "beating a dead horse" at this late date . . . but it was only a few days ago that Alan Woods called to ask if we had arrived at any particular Administration line regarding Mr. A. E. Fitzgerald. And someone else (I can't remember who) asked the same question at about the same time.

You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again—partly for the record—and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.

— Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.

— Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's "shoddy purchasing practices". Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military Services are, they very definitely do not go out of their way to waste government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new

ways to economize. If McNamara did nothing else he made the Services more cost-conscious and introspective—so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.

— Upon leaving the Pentagon—on his last official day—he announced to the press that "contrary to recent newspaper reports" he was not going to work for the Federal Government, but instead, was going to "work on the outside" as a private consultant.

— We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.

— We owe "first choice on Fitzgerald" to Proxmire and others who tried so hard to make him a hero.

cc: Mr. Ehrlichman
Dr. Kissinger
Mr. Klein
Mr. Colson
Mr. Nofziger
Mr. Magruder
Mr. Ziegler

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Excerpt From Plaintiff's Deposition
Exhibit 19
[pp. 8-9]

QUESTION: Mr. President.

THE PRESIDENT: Mr. Mollenhoff.

QUESTION: Did you approve of the use of executive privilege by Air Force Secretary Seamans in refusing to disclose the White House role in the firing of air cost analyst Fitzgerald?

It came up yesterday in the Civil Service hearings. He used executive privilege. You had stated earlier that you would approve all of these uses of executive privilege, as I understood it, and I wondered whether your view still prevails in this area or whether others are now entitled to use executive privilege on their own in this type of case?

THE PRESIDENT: Mr. Mollenhoff, your first assumption is correct. In my dealings with the Congress—I say mine, let me put it in a broader sense—in the dealings of the Executive with the Congress, I do not want to abuse the executive privilege proposition where the matter does not involve a direct conference with or discussion within the Administration, particularly where the President is involved. And where it is an extraneous matter as far as the White House is concerned, as was the case when we waived executive privilege for Mr. Flanigan last year, as you will recall, we are not going to assert it.

In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility in the White House—in this case it was a proper area in which the executive privilege should have been used.

On the other hand, I can assure you that all of these cases will be handled on a case by case basis and we are not going to be in a position where an individual, when he gets under heat from a Congressional committee, can say, "Look, I am going to assert executive privilege."

He will call down here, and Mr. Dean, the White House counsel, will then advise him as to whether or not we approve it.

[9] QUESTION: I want to follow one question on this.

THE PRESIDENT: Sure.

QUESTION: This seems to be an expansion of what executive privilege was in the past and you were quite critical of executive privilege in 1948 when you were in the Congress—

THE PRESIDENT: I certainly was.

QUESTION: You seem to have expanded it from conversation with the President himself to conversation with anyone in the Executive Branch of the Government and I wonder can you cite any law or decision of the courts that supports that view?

THE PRESIDENT: Well, Mr. Mollenhoff, I don't want to leave the impression I am expanding it beyond that. I perhaps have not been as precise as I should have been. And I think yours is a very legitimate question because you have been one who has not had a double standard on this. You have always felt that executive privilege, whether I was complaining about its use when I was an investigator, or whether I am now defending its use when others are doing the investigating—I understand that position.

Let me suggest that I would like to have a precise statement prepared which I will personally approve so that you will know exactly what it is. I discussed this with the Leaders and we have talked, for example—the Republicans, like Senator Javits and Senator Percy, are very interested in it; not just the Democracts, and I understand that. But I would rather, at this point, not like to have just an off-the-top of my head press conference statement delineate what executive privilege will be.

I will simply say the general attitude I have is to be as liberal as possible in terms of making people available to testify before the Congress, and we are not going to use executive privilege as a shield for conversations that might be just embarrassing to us, but that really don't deserve executive privilege.

QUESTION: The specific situation with regard to Fitzgerald, I would like to explore that. That dealt with a conversation Seamans had with someone in the White House relative to

the firing of Fitzgerald and justification or explanations. I wonder if you feel that that is covered and did you have this explained to you in detail before you made the decision?

THE PRESIDENT: Let me explain. I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me.

No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.

* * *

Plantiff's Deposition
Exhibit 25

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

February 1, 1973

MEMORANDUM FOR MR. DAVID WILSON
THE WHITE HOUSE

This will confirm our discussion of earlier this afternoon.

Our records indicate that Dr. Seamans discussed the Fitzgerald matter with Bryce Harlow on the following occasions:

May 9, 1969—Phone conversation

May 15, 1969—Discussion (This occurred at a White House breakfast where they met by chance

November 4, 1969—Phone conversation (Note: The official document abolishing Fitzgerald's job was signed November 3, 1969 to be effective January 5, 1970. The press and Fitzgerald were notified of the action on November 4th.

December 5—Phone conversation (Note: On December 5th, Dr. Seamans also had a phone conversation with Clark Mollenhoff.)

I have not been able to reach Spence Schedle, however, I have ascertained that he met with Clark Mollenhoff sometime after the decision was made probably in late November or December. I will confirm date tomorrow.

/JACK/
Jack L. Stempler

Plaintiff's Deposition
Exhibit 26A
[Entire exhibit is handwritten]

Jim Akins 2777
4 year term — Get back to Seevers re impoundment

HARLOW—

1) What was gist of conversations in May

2) Anybody also talk with Seamans or DOD before Nov. 4

3) Any objection to testimony in this regard—no [illegible]

4) Position at that time was Counsellor to the P

STEMPLER

On May 5, 1969 Nielsen had written memo on reorgan

6 & 7 — Laird & others testified

On 9th of May Seamans called Harlow at that time

on 15 ran into Harlow at prayer breakfast

HARLOW

May 15 — Seamans told him he was going to do it & wanted counsel as to timing & how to procede

2603
Correspondence

Plaintiff's Deposition
Exhibit 45

September 5, 1973

Memorandum for conversation with Melvin Laird, Special Assistant to the President, on the A. Ernest Fitzgerald case.

In commenting on the Watergate matter on August 29, 1972, President Nixon said: "What really hurts in matters of this sort is not the fact that they occur, because overzealous people in campaigns do things that are wrong. What really hurts is if you try to cover it up."

President Nixon has had agony in the last six months because of his failure to detect evidence that I, and many others, have tried to warn him about. He has also had a host of problems flowing from his administration's failure to take necessary steps to reinstate Mr. A. Ernest Fitzgerald in government after the wrongful discharge, "smears", and pattern of perjury and falsification by the Air Force had been pointed out to him and his top White House advisers.

There are many reasons for correcting the Fitzgerald case with direct presidential action which would take it out of the hands of Chief Hearing Examiner Herman Staiman. Some of the reasons involve "good politics", but to avoid any misunderstanding on the priority of the reasons I will list them in the order of their importance:

1. It is the right and decent thing to do. It is the quickest way to right a grevious wrong, and the only way that Fitzgerald can receive substantial justice without a longer ordeal. He has already been subject to a four-year persecution that is earmarked with evidence of vindictive, malicious actions for telling the truth on the C-5A overruns in November, 1968.

2. It is the legal thing to do. The reduction in force action was contrived to get rid of Fitzgerald because he displeased his superiors. There are laws that bar firing of government employees for telling the truth to Congress about questionable government operations.

3. It is the only thing to do to avoid implication in a criminal obstruction of justice for being a party to a cover-up of

the provable perjury, falsification of records and other law violation that have been a part of the Fitzgerald case and the C-5A affair. It is as dangerous as Watergate, for there would be little chance for denial of knowledge of proof that has been on the public record for months in various forms.

4. Correcting the case quickly will avoid involvement of many of the key figures in a multi-million-dollar law suit that Fitzgerald's lawyers are planning in connection with the violation of Fitzgerald's rights through malicious persecution and perjury. His lawyer, John Bodner, Jr., is expert in this kind of damage suit and feels he has the evidence to win.

5. Correcting the case before the Civil Service ruling can win President Nixon some credibility and some much-needed good will at a crucial time. Permitting the Fitzgerald case to stand until corrected by the Civil Service Commission or the Federal courts places the White House and the President in a position of "not giving a damn" for justice and the righting of wrongs. Such a course will only create further damage to the credibility of President Nixon and all others who can be associated with the case.

There are examples of why it is best to correct the wrongs and not let them fester:

The Otto Otepka case with its illegal wiretapping, admitted perjury, and destruction of records, will be a permanent blot on the record of Secretary of State Dean Rusk.

The Wolf Ladejinsky security case became a plus for President Eisenhower and Agriculture Secretary Ezra Taft Benson when it was corrected despite long delays in taking the corrective steps. It won them universal editorial praise for being "big men".

The Gordon Rule case was corrected quickly and the decision was praised. There has been no continued criticism of the case, and if anything about it is mentioned the rapidity of the corrective action is noted.

The Fitzgerald case has been a source of pain for the Nixon administration for four years and is destined to be a

problem for as long as it is not corrected. A final ruling for Fitzgerald in the Federal courts is as inevitable as the ruling he was entitled to an open hearing.

If there are those who believe that it will be wise to delay a decision until the last, and then disregard the orders of the court, I would suggest that this involves many political hazards that I would think the administration would seek to avoid.

It is best to leave the job offer conversations as "a misunderstanding". Fitzgerald says there were conversations about a job but that he never was offered a job that he rejected. He says that he left it with the understanding that Laird would contact him, or would have someone also contact him, with regard to a specific position. No contact was made, and after that a number of actions were taken by the Air Force that were inconsistent with a good faith effort to reinstate Fitzgerald. He assumed that Laird knew or approved the circumstances of these actions, and had no further contact on the job.

All that is needed in public life is one real provable wrong on a case that is clear and understandable and it can wipe out a pattern of good effective work.

Proxmire is on the right side on the Fitzgerald case and the only wise thing Laird can do is join him.

There should be no need for further discussion of the posture of the case, unless there is some question about the depth of proof on the perjury, subornation of perjury, falsification of records of general malicious conduct of various Air Force officials. In that event, I can explain or submit a written bill of particulars.

Clark R. Mollenhoff

Plaintiff's Deposition
Exhibit 59

The White House
Washington

[E HAS SEEN; RETURNED FOR YOUR FILES]
January 31, 1973

MEMORANDUM FOR THE PRESIDENT

THROUGH: JOHN EHRLICHMAN

FROM: JOHN DEAN /JD/

SUBJECT: Secretary Seamans' Refusal to Testify in the Fitzgerald Case

Yesterday, during the Civil Service Commission hearing on the dismissal of A. Ernest Fitzgerald, Air Force Secretary Seamans cited "executive privilege" as a reason for refusing to answer certain questions by Fitzgerald's attorney. Although we have not been able to examine the transcript of the testimony, this rationale was apparently used several times in response to questions concerning communications or consultations with members of the White House staff. Secretary Seamans was trying to prevent disclosure of the fact that he had discussed the Fitzgerald case with Clark Mollenhoff and Bryce Harlow while they were still on the staff.

For your general background, the assertion of executive privilege in judicial preceedings, unlike executive privilege vis-a-vis the Congress, is not uncommon and has basically been recognized by the courts as an evidentiary privilege rather than a constitutional principle. Under the established procedure, before a formal claim of judicial executive privilege is lodged, there must be consultation with a committee established in the Civil Division of the Justice Department and then, if necessary, final clearance by the Attorney General. Of course, in any case in which there is a White House interest, the Attorney General consults with me.

The normal situation in which claims of judicial executive privilege arise involve discovery efforts to obtain governmental documents which are either classified or an integral part of the decisional process. The procedure in these cases is to first exhaust all other possible evidentiary privileges, such as those relating to intergovernmental advice and recommendations, and then if these fail, to formally assert the privilege. Such a formal claim of privilege must be made in accordance with the procedures described in *United States* v. *Reynolds*, 345 U.S. 1(1953). That case restricts a claim of privilege to the head of a department or agency and requires that it be premised upon his personal inspection of the documents. It should be noted that *Reynolds* directly applies only to documentary evidence rather than testimonial evidence, but logic would demand extension to cover both.

The situation in the Fitzgerald case differs from the normal instance in which judicial executive privilege would be claimed because this Civil Service Commission proceeding, albeit a quasi-judicial proceeding, is entirely within the Executive Branch. Formal invocation of the privilege would not be proper in this circumstance. Instead, the witness would merely decline to testify about the privileged matters. If Fitzgerald's attorneys were to ultimately appeal the decision of the hearing examiner to the courts, then it would be proper to formally invoke executive privilege in accordance with the *Reynolds* doctrine.

The statements made by the President at the press conference this morning (attached at Tab A) do not conflict with the above interpretation of Secretary Seamans action, but will require further explanation by Ron Ziegler. The President explained that he did not approve a claim of privilege directly in the Fitzgerald case, but that it was approved by those who have the responsibility in the White House for these matters and was a proper area in which the privilege should have been used.

The President's statement is true in that I have generally explained to the Department of Justice and General Counsels

of the departments and agencies that judicial executive privilege can be properly invoked in situations involving possible disclosure of agency consultations with the White House. In this case, although it was not yet timely to invoke executive and Secretary Seamans did not do so, a formal claim of privilege will be approved if the issue ever reaches the courts. In the meantime, Secretary Seamans properly declined to testify as to such matters which later might be covered by an assertion of executive privilege.

The other point in the press conference which should be clarified relates to your statement that you approved the decision to fire or discharge Mr. Fitzgerald. Actually, Fitzgerald lost his job in a bona fide reorganization of the Department of the Air Force. The President approved this reorganization in the full knowledge that it would result in the elimination of Mr. Fitzgerald's job and, therefore, be the subject of great controversy. This action, in colloquial terms, has been referred to as a "firing", but is in truth the elimination of a job position in the course of a governmental reorganization that was essential to the improved efficiency of governmental operation. Of course, the central issue of the Fitzgerald case is this very point: whether Fitzgerald's dismissal was in effect an adverse personnel action arising out of a reorganization adopted solely in order to fire him or whether the elimination of his job position arose from a bona fide reorganization.

Plaintiff's Deposition
Exhibit 71

January 9, 1969

MEMORANDUM FOR THE RECORD

SUBJECT: Discussion with Secretary of the Air Force-designate Robert Seamans, January 9, 1969

On this date Dr. Seamans and I had two discussions, each lasting for about an hour and a half. Two of the subjects discussed were: (a) Mr. E. A. Fitzgerald and (b) the C-5 aircraft.

(a) With respect to Mr. Fitzgerald, I pointed out that, though some of his ideas about procurement practices and financial control of contractors had merit, his practices were unacceptable. These include speaking to the press against Air Force decisions, discussing internal Air Force matters with Congressional Committee staffs, and providing them with documents without going through Legislative Liaison channels. This behavior has greatly lessened, if not eliminated, his value as an employee of the Air Force. I drew the distinction between advocating one's views vigorously within the Department before a decision was taken, and public non-support, or volunteering and advocating contrary views to the press and the Congress.

I indicated that his actions up to now probably do not constitute sufficient reason for us to take removal action against Fitzgerald, but that we would act to make it clear to Fitzgerald that we considered his usefulness to the Air Force to be negligible if not negative. In the interest of discipline it was important that the new Air Force Secretariat take a similar position in subsequent months. Dr. Seamans indicated that he understood this principle and that, in the light of the facts that I had described, he recognizes that Fitzgerald is of no use to the Air Force; though his rights must be protected, he is to be discouraged from remaining.

(b) I described to Dr. Seamans the C-5 technical progress and its satisfactory performance, and contrasted them with the financial problems of the C-5. I said that we were convinced that we should buy a 4th squadron of the C-5 despite the cost increase, but that the Government should retain freedom not to buy a 5th or 6th squadron depending on further review and further cost history. I outlined the contractual arrangements on the 4th, 5th and 6th squadrons which I felt the Air Force and Lockheed could agree on. Dr. Seamans indicated that it was very desirable that the decision on whether or not to exercise the option, which expires on January 31, be taken before January 20, so that Mr. Laird would not be faced with a difficult problem, new to him, with only ten days to make a decision. I agreed that it would be very desirable to have the decision made and executed before January 20, and said we would make every effort to do so.

Dr. Seamans and I agreed that, in view of his problems of disengagement in Cambridge, I would stay on as Secretary of the Air Force until February 15th. The question of how to handle the weekend between February 15 and February 17 was left for further discussion.

Harold Brown

cc: Dr. Seamans

Excerpt From Plaintiff's Deposition
Exhibit 84
[pp. 4-6]

Q. Ron, do you have any further information on the Fitzgerald matter? MR. ZIEGLER: Well, I did, but I wanted to volunteer that and not respond to your questions.

Q. I withdraw the question. MR. ZIEGLER: Adam Clymer asked a question this morning regarding the Fitzgerald matter and I had said the President mentioned briefly to me this morning that he wanted to discuss that with me further. I have had a chance to talk to the President about it.

He indicated to me that after reading the transcript of yesterday's press conference that he was mistaken in his reference to Mr. Fitzgerald and the fact of the matter is that the President did not, as indicated yesterday in the press conference, have put before him the decision regarding Mr. Fitzgerald.

We can find no record—the President requested that a check be made of this—of the matter ever being brought to the President's attention for a decision.

So the decision regarding the reorganization that took place in the Air Force, which dealt with Mr. Fitzgerald, was a matter dealt with solely by the Air Force.

The question, as you recall, yesterday was a complex question related to the area of Executive privilege and the follow up question, I believe, related to Mr. Fitzgerald. And the President, as he said to me, misspoke himself in response to that question and wanted me to clear that up at the soonest possible opportunity. As I mentioned to you, he said early this morning that he wanted to talk to me about it and I have had a chance now, following the meeting, to talk to him about it and he asked me to convey this information to you.

Q. If the President did not deal with it, as you say, what is the basis for Air Force Secretary Seamans' claim of Executive privilege at the Civil Service Commission hearing? MR. ZIEGLER: Mr. Seamans' claiming Executive privilege at the Civil

Service hearing relates to the fact that that was a matter dealing with a situation which falls totally within the Executive Branch and in that case the situation that existed differs from the normal invocation of Executive privilege, such as that which would occur before Congressional committees. It deals with the fact that you have privileged information regarding an exchange of information or a seeking of advice from a member of the Executive Branch, from a member of the White House staff, and that is the basis on which he informally invoked Executive privilege.

[5] Now if this case was ever taken before a formal judicial body, then if Executive privilege would be invoked then it would have to be invoked on a formal basis.

As you recall, the President, in his response to the question yesterday, stated that he did not directly invoke Executive privilege in relation to the Civil Service hearing, and this is normal procedure in an instance that deals with privileged information in exchange between members of the Executive Branch while it is an in-house matter.

Q. Am I not right, hasn't this been before a judicial body and they came back and said the Civil Service had to have open hearings on it and how can you possibly excuse the use of Executive privilege when the President didn't give his permission? MR. ZIEGLER: That is the very point, Sarah. The element of Executive privilege was invoked in a hearing that fell within the category of the Executive Branch. If it moved from that particular hearing setting to a formal judicial body, then if Executive privilege was invoked, it would have to be formally invoked.

Q. Based on what you know of this case, would this be a proper subject for formal Executive privilege in the event that you say? MR. ZIEGLER: I can't draw a judgment on that at this point.

Q. Could I ask one more question? If the President was not referring to Ernest Fitzgerald as the person he ordered dismissed and he will stand by that, who was he referring to?

MR. ZIEGLER: We talked about that and he said he simply misspoke himself and should have applied "not" instead of the affirmative in which he replied.

Q. Did he say who he had in mind? MR. ZIEGLER: No, he did not.

Q. Did the Air Force complain yesterday afternoon or this morning from the President's assertion that he had approved the firing which the Air Force maintains is not a firing? MR. ZIEGLER: No, they did not complain. It is not a matter of the Air Force complaining. It is a matter of the President reviewing the transcript. Yesterday evening, as he said, he was working on his remarks for the event this morning, the Prayer Breakfast, and preparing for the Heath meeting today and during the course of the evening following the Sato dinner last night, he reviewed the transcript and noted the details of his response and simply found that he had a question about that particular answer, and discussed it this morning and asked me to convey the fact that he misspoke himself.

[6] Q. Anything else you want to correct in that transcript? MR. ZIEGLER: No, as a matter of fact, I think this is the first time I have corrected something in four years in a Presidential press conference transcript because this is the first instance in which he has asked me to do so.

Q. Ron, does the President regard Mr. Fitzgerald's case as a firing? MR. ZIEGLER: The President's point of view about the Fitzgerald case is one that I don't think I should formally express. The Fitzgerald matter is a situation that was dealt with within the confines of the Air Force and the Defense Department.

Q. In view of all the publicity on this thing that Mr. Fitzgerald got yesterday, are you going to notify the Civil Service Commission that you really didn't mean Fitzgerald so Mr. Fitzgerald won't get a worse name? MR. ZIEGLER: Well, I think the fact that we are stating this publicly, Sarah, is something that will be rapidly called to their attention.

Q. Ron, in the check that you had made, was it determined whether or not the Fitzgerald matter was brought before anybody on the White House staff at the time? MR. ZIEGLER: The check we had made was to determine whether or not—and this has been some years ago, as you all know—in any form at all, in writing or in any other way that it could have been brought to the President's attention and that check indicated that it was not.

Q. But did it come before anybody on the staff here? And was the decision made there? MR. ZIEGLER: I am not aware of that.

* * *

Excerpt From Plaintiff's Deposition
Exhibit 94
[pp. 1-15]

The following transcript is a supplement to a series of oral-magnetic-taped interviews conducted by the Air Force with Robert C. Seamans, during September 1973, November 1973, and March 1974. The portion covered in these pages was tape recorded on 13 March 1974 by Mr. Hugh N. Ahmann of The Albert F. Simpson Historical Research Center.

A: Was this following a pattern of other presidential—IRS and different agencies were becoming more and more . . . ? S: Sure. Every agency in the department. You've got (Alexander P.) Butterfield, a colonel in the Air Force, to be sure. He was very close to Haldeman. He (Butterfield) was in charge of all those tapes and everything, after all, over there. He ends up being administrator of the FAA. (Egil) Krogh, Undersecretary of Transportation, Deputy Secretary, whichever it is. I mean it was just happening everywhere.

A: Would you want to address Ernest Fitzgerald at all? S: Sure, we can talk about that a little bit if you'd like. I don't know what the final answer is going to be, but I'll just give you a little summary of it if you'd like. I guess we haven't discussed it up until now.

[2] A: No, we really haven't. I mean like the question is, obviously, was he fired, or was his job eliminated to have him fired, that whole area. S: Just for the historical record, if you want to really dig into it, I had to go before the Civil Service Commission examiner for three full days and be asked questions by the legal profession and the Civil Liberties Union. I'll tell you those were tough proceedings, all in public. So it's all on the record. What I'll say is sort of in addition to all that factual information that's all there.

I never heard of a guy named Ernie Fitzgerald until either the last week in December or the first week of January 1969. By then I had agreed to join the Air Force and starting as of 15 February. I had a lot of stuff to clean up in New England, not

just at MIT but other things as well. I was trying to get together with Harold Brown and get familiar with the job by putting in maybe one or two days a week during that six-weeks period. I'm sure it was on my first session with Harold Brown that he brought up the C-5 and Ernie Fitzgerald. I didn't know much about the C-5 either really, [3] although I had heard of the airplane and so on. Harold was faced with a decision of whether to exercise one of the options to go ahead with the preliminary work on an additional—I guess it was—25 aircraft, which took the total number up to I guess, what?, 57 to 81 or whatever that number was. And it was an option that they felt they ought to pick up prior to the inauguration. I was trying to stay in the posture with him of, "I'm glad to hear about these things so when I have the responsibility I'll know about them. But don't go on the basis of my views. You're the Secretary of the Air Force now. These are your decisions."

As time went on after that, I was sort of glad I had made that quite clear, not because Harold ever tried to say, "Well, Bob Seamans agreed to it," but others in front of Congress and everything sort of would say, "Well, didn't you know about this before you were sworn in?" and all of that. I'd say, "Yes, I was acquainted with what the issues were, but I had no part in the decisions."

At that very first meeting he told me a little bit about a guy named Ernie Fitzgerald, and I'm pretty sure that by then that [4] Proxmire had written me a letter through the Air Force office, quite a long letter. It talked about this "wonderful public servant." First, he congratulated me on becoming Secretary of the Air Force and then talked about this "wonderful public servant" and was glad that I was coming in because he was sure that I'd need the services of this "wonderful public servant" and would want to rely on him heavily because he was one of the "greatest public servants" that had ever come down the pike. So I wrote him back a short letter and said, "Thanks very much, and I'll look into this matter when I become Secretary of the Air Force." The facts of the matter are that Ernie did testify on the C-5; that he was certainly not encouraged to do so; that this was bigger than just the Air Force. I guess Bob Moot and others got

into it, didn't want him to testify on the thing. Between Fitzgerald and Proxmire, they were "coony" enough to make it well-known publicly that he was up there testifying even though the Defense Department hadn't wanted him to. Of course, that made it all the more exciting and everything appeared more valid and the Air Force and DOD looked more like conspirators deceiving the public. Then, of course, a few strange things happened in the Air Force, the most amazing being the memo that John Lang (of Personnel) wrote to Harold Brown on three ways for separating Fitzgerald from the [5] Air Force. One was to fire him for cause; one was to abolish his job; and the third one, which he said would be a little deceitful, would be to—and I can't remember what the third one was offhand, but it's all in the memo. It took about 24 hours from the time that Lang wrote the memo until Proxmire had the memo. There's no question in my mind that there was a very good set of information points that Ernie had over there with secretaries for knowing what was going on. A lot of strange things have happened, but they're not germane really, and they're all in the record.

After being sworn in and wrestling with a few of the immediate questions, such as should we go ahead with another 255 FB-111's or start on the B-1?, I got around to Ernie Fitzgerald. And I found that (Tom) Nielson, who was his boss, was very upset about him and kept wanting to come in and talk to me about it. He actually wrote into the record in December or January that he had reached the conclusion that Ernie had to go for the good of the Air Force. So I may not have been smart, but I think I did what you sort of do naturally, and I know this is what John McLucas has tried to do since, without have it very satisfactory.

[6] I invited him to come in and chatted with him, and I tried to size him up. I tried to get across the message to him that if his interest was really in doing a better job managing major programs and keeping the cost down and so on, I'd like to work with him on it. But if his interest was in getting publicity and trying to shoot the Air Force down and to be

generally obstructive, then he ought to consider leaving. You know, he had to make up his own mind which way he wanted to go, and that's the way it was left.

I wasn't terribly impressed with him as a manager and administrator. He was obviously a man who was very limited. His experience was not in managing programs. His experience was in developing management systems. That's his whole background until he got into all this publicity arena. Of course, he's terribly good at playing the southern boy from Alabama, the country boy taking on the big corporations and all these big money spenders and the generals—the "High Priests of Waste." Then as time progressed and Nielson kept wanting to come in and get his office reorganized with an idea that Ernie's job wouldn't be there anymore.

[7] By then I knew I was going to get a new Assistant Secretary of Financial Management. I couldn't really see making an organizational change in that office and then changing the Assistant Secretary. I mean that was the wrong order to do things in. I guess it was in March I was starting to interview people for that job. I guess Schedler agreed to come in April. By the time the clearances went through and he was sworn in and available and everything, it was May. The first order of business for him was to see how to do a better job of Financial Management and to see how we were going to work with Ernie Fitzgerald. At the time that I was talking to Schedler, I hadn't completely made up my mind as to whether Fitzgerald was a lost cause or not. But in May I was quite certain that Fitzgerald should leave the Air Force for his good and ours.

In the first week of May I got information that there was a lot of Air Force material that was being used by Congressman (Wm. S) Moorehead (D-PA) on the Holifield Committee and this was being supplied by Ernie Fitzgerald. That was by a guy named (Herb) Roback. He is the key staff guy up there on the Holifield Committee, and the Holifield Committees, The Joint Operations [8] Committee is a key committee. He also indicated that Ernie was up there a great deal, that he was

conducting seminars for other staff people on the poor job the Air Force was doing on its weapon systems programs. Well, I didn't see how I could use that information. I couldn't put Roback in a spot of going public on second hand information.

The day before I was going up to testify before the armed Services Committee, John Murphy, who was then in charge of Legislative Liaison, came in, and he said, "Well, it's all out in the open now. At the meeting this morning, some of the Air Force material that Moorehead had was being used by Moorehead, and Holifield said, "Well, do I have that material? I don't remember seeing that material." And Moorehead said, "No, I've just received it." "Where did you receive it from?" "Well, I received it from that wonderful public servant, A. Ernest Fitzgerald." "Well, isn't it classified?" and all this kind of thing, all right there in the records." The next day I was testifying. Right in the middle of the questioning—I forget who it was. I think it was the congressman from Alabama started getting into this issue of the Air Force picking on Fitzgerald. I made a mistake probably, but [9] I said, "If you really want to talk about who's picking on whom, I'd really appreciate it if Fitzgerald would work for the Air Force rather than somebody else." Then I immediately realized I had probably gone too far.

Pretty soon all of the committee started getting alert, and they all started asking me questions about it. That's all in the record what was said. At the time I was testifying, I really thought that Ernie had given them classified material, marked "Confidential." Later on, when we still had the opportunity of going over the testimony, it wasn't clear as to whether any of the material was classified or not. So we changed the word from confidential with a capital "C" to confidential with a small "C." In correcting the testimony of the Holifield hearing, Moorehead's office took out the part where he said, "Yes, I received it from A. Ernest Fitzgerald." So it's no longer in there as directly as it was in the original transcript. But I have the original transcript, which I used in front of the Civil Service Commission. However, even in the corrected version of the Holifield hearing, Moorehead admitted to receipt of information for Fitzgerald. This was in a later section.

[10] Another question that—I wasn't asked by the Civil Service commission, and I made up my mind going in there that no matter what happened I was going to be responsive to their questions and obviously tell them the truth up to the point where I talked about conversations I had outside the Department of Defense. This may seem like a strange thing to have to tell yourself—but you'd be surprised when you get in front of those lawyers how you can get twisted around mentally. Then at that point I was just going to draw a line, say, "I'm not going to talk about it." Now maybe I was wrong on that. That was completely my own judgment.

The people that I talked to outside the Department of Defense were, first of all, Bob Hampton, who runs the Civil Service Commission. I did chat with him about this in May and asked him what are you supposed to do when you're managing a large government program and you've got a guy like A. Ernie Fitzgerald on the payroll? He said, "It's frankly one of the problems we face in running the government, and there's no very good answer to it." He said, "On the basis of what you've told me, I don't believe you could ever [11] sustain a separation for cause. So your only alternative is to abolish his job." I kept Mel Laird informed on this, and Mel Laird tried to find some way of moving Fitzgerald down to work with him in some kind of capacity. But every move that was discussed, working with the Blue Ribbon Panel, for example, always involved *loaning* Fitzgerald.

I thought at that time that I didn't come down to Washington to have to put up with that kind of behavior. And if we were going to make a move, the time to make it was when we had the facts at hand and not equivocate for a year and then be faced with the problem all over again. At the same time, I was asked to call Bryce Harlow at the White House on this matter. He said, "Well, I see you've got a problem, but this is not the best time to separate Fitzgerald." So time went on, and the situation got no better. It got worse all the time. For example, Ernie complained that he was removed from the Source Selection Advisory Council when in fact I abolished the Council not even knowing he was a member. The Air Force would

have a meeting on something to do with the C-5, and it would be up there on the Hill in a few days.

[12] One of the issues that came in June was whether Ernie possibly still had a financial interest in his old company, (a), and, (b), whether he hadn't steered some Air Force business to the company in which he had this financial interest. And we ought to investigate it. I said, "What's involved in an investigation?" "Well, you have to get the FBI in, and they in turn can look over all his income tax filings and so on." I said, "Not on your life. We're not going to touch it." It was one of those areas that was fraught with difficulty. I went down, and I checked with Laird on this. I said, "I think this is the wrong thing to do." He said, "I agree. There will be no investigation." Then it was the end of October, I guess, somewhere in there in the fall, we were reducing the secretariat by 70 positions. I think we made a reduction of over 10 percent in the Air Staff. We were trying to make reductions of up to 15 percent. By then we had carefully worked out a management reorganization in Financial Management, abolished his job. It was a very complicated action because he was in Schedule A, and only had bumping rights in two other jobs, where he clearly wasn't qualified; in personnel I guess they were. So he had no recourse in the way of seniority. He never had tenure [13] at anytime. He was hired for two years, and this was his sixth year. My view was that in a reduction of over 10%, his previous actions didn't give him immunity, and there was a real need to improve financial management. On this basis, we bit the bullet, and within hours—I think I'm right—certainly within less than an afternoon's span from the time Schedler gave him the notice of separation, he was on all three networks with Proxmire. I was sure that was going to happen. Then, of course, after that he went to the Civil Service Commission to be reinstated, and then he insisted that the hearings be open to the public, which they never had been before.

One other wrinkle that I'd almost forgotten: The day after this thing became public I got a call from Clark Mollenhoff over at the White House, and he was there as the ombudsman of the White House. He was the guy that was supposed to look around and see where there were problems and listen to what

the press complaints were and help the White House be more responsive. He called and said, "What's with this guy Fitzgerald?" I explained it to him, and he said, "Well, what have you got on him?" I said, "What do you mean by what have I got on him?" He said, "Have [14] you got pictures of him in bed with somebody else's wife, or has he committed any crimes?" I said, "We don't have anything like that." He said, "If you don't have something like that, you'll never make this thing stick." He is the guy that broke the (Otto F.) Otepka (U.S. Dept of State Security Officer) case. And he said, "If I wasn't over here in the White House, I'd make mincemeat out of you on this one. You don't have a case that will stand up." And I said, "Well, thank you very much.". And I refused to ever talk to him about it again.

Of course, he was the guy who sat in on the Civil Service hearings three years later. He was the guy that wrote stuff for the newspapers about it at that time. He was the guy that went over and questioned the President about it at press conferences. But then he had been sitting right in the White House. The day after he talked to me from the White House there was an article in the Chicago Tribune saying that the White House is considering overruling the Air Force for abolishing Fitzgerald's job. I never knew that there had been actual paperwork in the White House on this until Watergate came out, and there was a letter in there that Butterfield had written. This was about two months after—[15] must have been after this conversation I had had when, for some reason, Clark Mollenhoff was still pushing to have him reinstated. And Butterfield's letter was written to Haldeman and said, "We've probably got to request the Air Force reinstate Fitzgerald. We're going to have to take too much publicity and flak if we support the Air Force on this." Nothing in there about whether we were right or wrong or anything like that. But he said, "This will not be too good for morale if people think it's too easy to get reinstated, so let's just let Ernie hang and spin for a while."

I never saw that memo when I was in the Air Force. Then the final ruling of the Civil Service Commission—well, in

addition to going through all the facts of this matter in front of the Civil Service Commission, I'm sure I made it clear, if you look at the record, that I didn't have very much respect for Fitzgerald, for the job that he was doing, or for his capability to help. At the same time, we had abolished his job. We had reorganized the Department, and we had to make substantial reductions in people. And just because a person was notorious, in my view, didn't give them immunity from having their jobs abolished.

* * *

Plaintiff's Deposition
Exhibit 113

January 6, 1969

MEMORANDUM FOR DR. BROWN

SUBJECT: Background Information Relating to Fitzgerald Case

In the Civil Service, all positions are either in the competitive or excepted service. The latter simply means that employees may be selected without the normal competition by examination which is required in the competitive service. The vast majority of positions are in the competitive service, however, there are three categories of positions excepted: Schedule A (positions other than those of a confidential or policy-determining character for which it is not practical to examine); Schedule B (the same type of positions where it is not practical to hold a competitive examination); and Schedule C (positions of a confidential or policy-determining character).

Mr. Fitzgerald's position is excepted under Schedule A. In the Air Force, there are several types of positions excepted under Schedule A: all attorney positions; civilian chaplain positions; part-time and intermittent positions; summer trainee positions under the Youth Opportunity Campaign; cadet hostesses, physical education and music instructors at the Academy; positions on the AF cable ship operated by the AF Communications Service; and the specific authority which covers Mr. Fitzgerald's position; "213.3109(a). Office of the Secretary. Three special assistants in the Office of the Secretary of the Air Force. These positions have advisory rather than operating duties except as operating or administrative responsibilities may be exercised in connection with the pilot studies." It is important to note that positions are excepted from the competitive service only after being recommended by the agency, approved by the Civil Service Commission and published in the Federal Register. The other two positions excepted by this specific authority are: Deputy for Personnel Policy, GS-17, SAFMR, occupied by James P. Goode; and Deputy for Transportation

and Communications, GS-17, SAFIL, occupied by John W. Perry.

As an employee in the excepted service under Schedule A, with Veterans Preference, Mr. Fitzgerald has certain rights, which can be grouped in two categories:

(1) *Adverse Actions.* Chapter 752 of the Federal Personnel Manual applies to discharges, suspensions, furloughs without pay, and reductions in rank or compensation taken by agencies against employees of the United States Government. Mr. Fitzgerald's rights are:

(a) Adverse action may not be taken except for such cause as will promote the efficiency of the service;

(b) He must be given at least 30 full days advance written notice, identifying the specific proposed action, stating the reasons supporting the proposed action, including names, times and places;

(c) The notice must tell the employee that he has the right to reply, both personally and in writing and to submit affidavits in support of his answer;

(d) Normally he must be retained in an active duty status during the notice period;

(e) Full consideration must be given to his reply and if the decision is to effect the action originally proposed, or some action less severe, he must be given a dated and written notice of the decision promptly after it is reached;

(f) The notice of decision must inform him of the effective date of the action, of his right to appeal the adverse action within the agency and to the Civil Service Commission, and of the time limits and procedures for making the appeals.

(2) *Reduction in Force.* In the event his job is abolished, Mr. Fitzgerald is in Tenure Group 1 in the Excepted Service and has the right of full application of all reduction-in-force procedures insofar as "bumping" and "retreat" rights within his competitive level grouping. However, since he is the only

employee in his competitive level grouping and since he did not progress to this position from other lower grade positions, the net result is that he is in competition only with himself. He could neither "bump" nor displace anyone.

These are the rights involved should charges be preferred or should his position be abolished. There is a third possibility, which could result in Mr. Fitzgerald's departure. This action is not recommended since it is rather underhanded and would probably not be approved by the Civil Service Commission, even though it is legally and procedurally possible. The Air Force could request conversion of this position to the career service, utilizing competitive procedures, and consider all the eligibles from the Executive Inventory and an outside search. Using this competitive procedure, Mr. Fitzgerald might or might not be selected. If not, displacement action would follow.

When Mr. Fitzgerald was appointed in September 1965 by Assistant Secretary Marks to fill the vacancy created by the departure of Mr. J. Ronald Fox, it was with a mutual understanding that this was to be a Schedule A appointment of two or three years duration. There is nothing in official records to support this understanding. Dr. Flax contacted Mr. Marks by telephone on January 2, 1969, and verified this understanding and reflected the conversation in his memorandum to the Secretary of Defense, a copy of which is attached. We have carefully screened all files and records and can find no formalized confirmation of this understanding.

If you desire additional information or more detailed specifics, I have the complete files available.

JOHN A. LANG, JR.
The Administrative Assistant

Excerpt From Plaintiff's Deposition
Exhibit 131
[p. 1]

November 4, 1969
[Released by OSD/PA 1700-4 Nov] *

MEMORANDUM FOR CORRESPONDENTS

The Secretary of the Air Force announced today that as part of a reorganization related to the reduction in force of about 850 military and civilian positions within his office and Air Force Headquarters, the position of Deputy for Management Systems in the Office of the Assistant Secretary of the Air Force for Financial Management will be eliminated.

Reorganization of the Office of the Assistant Secretary of the Air Force for Financial Management has been under study for some time. The preceding Assistant Secretary, Mr. Thomas Neilsen, had recommended reorganization prior to his departure, but this action was not implemented.

The present Assistant Secretary, Mr. Spencer J. Schedler, has been working on reorganization plans for several months and with the Secretary's approval is implementing the new organization of his office in conjunction with the current reduction actions in the Air Force.
[illegible] *

[Q & A's attached were provided to OASD/PA. Most were used in one form or another] *

* Material in brackets is handwritten.

Plaintiff's Deposition
Exhibit 137
[Entire exhibit is handwritten]

Seamans' Communications with White House Re Fitzgerald

1. May 9, 1969 Telecon with Bryce Harlow.
2. May 9, 1969 Telecon with Lamar Alexander.
3. May 15, 1969 Talk with Bryce Harlow at White House.
4. November 4, 1969 Telecon with Bryce Harlow.
5. November 5, 1969 Telecon with Clark Mollenhoff.
6. December 4, 1969 Written statement to Clark Mollenhoff.
7. December 5, 1969 Telecon with Bryce Harlow.
8. December 5, 1969 Telecon with Clark Mollenhoff.
9. January 31, 1973 Talk with John Dean at White House.

Plaintiff's Deposition
Exhibit 140

Transcript of Part of Conversation
Between Richard Nixon and Charles Colson
4:17 P.M. January 31, 1973
Oval Office

President: Like, out there, I was very informal today, you know. I just, you know, talked quite a while when I wanted to. Kidded around with Mollenhoff. (laughing) He, he sure presses though.

Colson: That was a tough one too—Eh—

P: Well, it's all right, all right.

C: That's one you, one you—

P: That's what I—However, it's his perfect right. It's good to answer [to disarm him] [unintelligible].

C: I'm just delighted you said you wanted a written opinion because (pause) Course I don't know that that Watergate question, you know is (pause) is gonna be a very delicate one (pause). If—

P: Don't we have to have a written opinion?

C: We should have an opinion.

P: Yeah, I don't want to do it off the top of my head.

C: Oh no, no. I was so relieved when you did that because Mollenho—I could tell what Clark was doing. He was, he was working, working around on—

P: Yeah.

C: the Fitzger—

P: This guy that was fired. I'd marked it in the news summary. That's how that happened. I said get rid of that son of a bitch. You know, 'cause he is, he's been doin' this two or

three times. So Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it.

C: Right.

P: But anyway, that's why I didn't back off of that. But, uh, there are areas as far as Watergate's concerned, I can't claim privilege.

Transcript of Part of Conversation
Between Richard Nixon and Charles Colson
4:17 P.M. January 31, 1973
Oval Office

Colson: And if you get a fluke like the executive privilege thing, the easy answer is—

President: [unintelligible]

Colson: yes, I invoked it. It was properly invoked under these circumstances, and, uh, if you are confused about my position, I'll be glad to issue a policy statement [unintelligible] on a very complex subject that involves the operation of the Government, period. And move on to something else.

Transcript of Part of Conversation
Between Richard Nixon and John Ehrlichman
4:32 P.M. January 31, 1973
Oval Office

President: Actually I was going to check [unintelligible] curiously enough on Watergate and executive privilege.

Ehrlichman: Well I should've—but I—

P: It didn't make any difference.

E: That's something about [unintelligible].

P: What I, what I, no, what I did make a bit of difference about with Dean; we were talkin' about it and I uh, I was pressed for the moment by our friend—

E: Yeah.

P: [unintelligible] there.

E: Yeah.

P: And I, I think I've handled it in a way that probably is a good thing for us to do. You should have the most godawful gobbledygook answer prepared. Just put it out on executive privilege. Something that will allow us to do everything that we want. Our—

E: I lean—

P: I frankly took the line which uh which uh to give them that or the Congress. I, I want to cooperate the I'm going to have it like Mr. Flanigan. We made him available—

E: Right.

P: and so forth. On the other hand uh we have to stand forth, you understand?

E: I've been making the rounds up there. I've talked to Ervin and all these people and uh that I've been showing them the letter that you wrote Moss back in '69 that says all that same thing.

P: Well, why don't you just brush the letter off and, in order to get it, why don't you just give to Mollenhoff as an exclusive?

E: All right.

P Why not?

E: Well, the others'll ask Ziegler for it I imagine in due course. But—[unintelligible].

P: [unintelligible] give it to Mollenhoff.

E: And then he can say, uh, he can give that he's asked Ziegler for it.

P: All right. And Mollenhoff puts it out and Ziegler says, yes, Mollenhoff had this thing—

E: Uh.

P: [unintelligible] Clark—

E: Well—

P: won't satisfy 'em.

He wasn't doin' you any favors today, I'll tell you that, that it was Mollenhoff saying (pause) goddamn on that specific case.

P: I know that he's been having a problem.

E: Uh.

P: Actually on that case you know I recently recall specifically telling somebody (pause) Harlow.

E: Uh, he talked to Harlow about it I believe, but it uh as we've been reconstructing it—

P: When?

E: When Harlow was here. This case arose way early in the administration.

P: I thought it was a later—

E: No, no, no, no this is that guy that, uh, ratted on the C5A overruns.

P: Oh, yeah.

E: Way back.

P: But he's still in the Government.

E: And, no he's not and uh he's appealed to the Civil Service Commission to be restored.

P: I'm thinkin' of another case. Well, any rate, I backed it up—

E: Yeah.

P: which I shouldn't.

E: Yeah. Well, that was fine and we're—

P: Seamans claimed it.

E: we're coverin' your tracks.

P: I didn't want to have any indication of somebody down the line having [been] used privilege uh without—

E: OK, it's OK, we're coverin' his tracks. Uh, Seamans was wrong, he had no right to invoke it, but you backed him up and we can put it, we can put it together in such a way that everything's OK, and uh, don't worry about it.

Transcript of Part of Conversation
Between Richard Nixon and John Ehrlichman
4:32 P.M. January 31, 1973
Oval Office

President: Uh—let me say that I, I've read this case, John. I'm thinking of another guy, actually, I—I—

Ehrlichman: You're thinking of that Navy fellow that talked about Ash. Yeah, the liti—
P: [unintelligible]

E: —this was four years back.

P: You see I had two names—

E: Yeah.

P: —in my mind. Well, it wasn't, of course, that I—

E: No problem.

P: —didn't really, didn't really know—

E: No problem.

P: —the question. But I had to back up the son of a bitch Seamans.

E: Here's what we've done. Just so you get a feel of it. You know the procedure is if a cabinet officer wants to invoke executive privilege he refers it to the Attorney General.

P: Yeah.

E: —says I won't answer the question now, refers it to the Attorney General—

P: Yeah.

E: —and it eventually comes to you if it's, if it's meritorious. So I—

P: I invoke.

E: That's right, and so what, what we're saying is, by the language that Seamans used, he was beginning that process. Here it goes on. Meantime, he has referred this to the Attorney General. The Attorney General's going to look at it and make

a decision as to whether he should answer the question or not. And, you were aware of this fact and you acquiesced in the procedure being started. He made no final ruling.

P: [unintelligible] by that time. But, basically, I said a little more that. I said—

E: No, you were actually pretty good when you read the strict words.

P: I understood, I understood what it was and I approved—uh, I was aware of the case—

E: Yeah.

P: —which I was. Harlow had raised it with me I think.

E: That's correct. That is, way back—

P: Early part of [unintelligible]—

E: So did Clar—, so did Mollenhoff, interestingly enough, uh, this guy, had talked with both Mollenhoff and Harlow here. And I believe [that] at one time or another they both talked to you about it. But Harlow particularly talked to you about it. But you see [one fact]—

P: [unintelligible] canned.

E: —whether or not he should be, uh, well, he really wasn't fired, he was sort of transferred into a non-existent job.

P: So Harlow [unintelligible].

E: Oh yeah, yeah, definitely.

P: Well, that's what I thought.

E: He was a, he was a thorn in everybody's side, you see—

P: Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly].

E: That's the point; and cutting up his superiors.

P: That's right.

E: Yeah.

P: And not, and frankly, not taking orders.

E: Well, uh I, I got a, memo here whi' which the facts of the, of the whole Fitzgerald thing—[unintelligible]

P: Might as well put it out, just put out the procedure and so forth and so on. And, uh—

E: On the other thing—

P: The uh, uh, the uh, the uh, with your executive privilege one, just let, uh, if you want, just let, uh—

E: I would rather have Ron just give it to Clark and, uh, let him run with it.

P: Right.

E: Turn him on—[unintelligible]

P: [unintelligible] turn on, but at least it'll help a little, you know.

E: It [sure would/should].

P: Here's the reason I'd give it to Clark. We know that he's been bitching about a lot of things, and so forth and so on. And they think that around here simply because somebody bitches that it [unintelligible] I don't want people to get the impression sombody has to be a hundred percent, John.

E: [unintelligible]

P: Nobody, nobody around here, nobody on our side that would be a hundred percent, except [unintelligible] and, uh, and we [unintelligible] what we [unintelligible].

E: Uh huh.

P: And nothing we can expect never comes to this kind of administration.

E: I getcha.

P: On the other hand, therefore, that they're, that they're on and off, uh, uh, Ziegler was pissed off at him and I wanna do some [unintelligible]. However, [unintelligible] and I say he doesn't have to be a hundred percent. The, uh—at least Mollenhoff doesn't have a double standard. As I said.

Transcript of Part of
Telephone Conversation Between
Richard Nixon and Ron Ziegler
6:51 P.M. February 1, 1973
Executive Office Building

President: Did you get that, uh, did you handle that problem with you uh, uh, the uh, what's that Kilpatrick?

Ziegler: Uh, Fi-Fitzgerald.

P: Yeah.

Z: No problem at all. I just went out and uh—

P: Yeah, I wouldn't let, let 'em make a big thing.

Z: No, they didn't As a matter of fact—

P: It isn't really. It's just a question of uh—

Z: Said that you had been reviewing the transcript last night—

P: Yeah.

Z: after the dinner—

P: Yeah.

Z: when you—

P: Yeah.

Z: were working on your remarks—

P: Yeah.

Z: and so forth and you want [unintelligible] talk about it this morning and uh, and uh, after the Heath thing we discussed it and you wanted me to simply say that you were, that it had never been put before you, that uh, that uh, uh you had misspoken on that, misunderstood the thrust of the question and wanted me to tell 'em that.

P: Uh huh.

Z: And there was no, no problem at all.

P: Uh huh, We uh—by the uh—yeah.

Z: The executive privilege part—

P: Yeah.

Z: Right.

P: Yeah, yeah.

Z: But it uh was not an issue.

P: [unitelligible] questions, as well it would be with Mollenhoff [unintelligible]

Z: Well, I've talked to Clark personally, and he's in good shape.

P: Uh huh.

Z: Matter of fact, he had called uh, uh, both Pat Buchanan and myself and said that he thought that you had, may had, uh—

P: Uh huh.

Z: Uh mis, misunderstood what he was asking—

P: No, I was—

Z: and suggested we—

P: That's right.

Z: we uh, we handle it this way.

P: Uh huh.

Z: So he's in good shape, and we're going to give him the executive privilege, uh, statement tomorrow.

P: Good.

Z: And he's looking forward to that.

P: Good. Good. Good. Fine, fine.

Transcript of Part of
Conversation Between
President Nixon and John Dean
9:12—10:30 A.M. February 28, 1973
Oval Office

President: I understand that y—, y—, that Mollenhoff still thinks everybody should go up 'n' testify.

Dean: That's right.

P: Well——,

D: Uh—h—h.

P: But at least ya had a talk with him. I do want ya to look into the case, though.

D: Yes, sir, I am. [unintelligible].

P: If the guy has got a bad rap, uh, his, his man, God damn it, we'll get him out of it.

D: I'm doing that. I talked to Clark, uh,—

P: Yeah.

D: —yesterday. Uh, uh, I talked to him last night again,—

P: Yeah, OK.

D: —and he's on this as hot 'n' heavy as can be, and I—

P: Well, does he think he's got a bad rap?

D: He does; he thinks he's got a bad rap, and I, you know—

P: Maybe he has.

D: It's very poss—

P: I know Rule doesn't have a bad rap. That one, which, uh, uh, I, I — When Rule, Rule, Rule, uh — Because when a, when a, when a bureaucrat takes it upon himself to go out and, and go 'way beyond the pale in terms of attacking the administration, why, that can't be tolerated. I mean, he, he just—.

D: It's [unintelligible] different [unintelligible].

P: Suppose a Congressman or a Senator or one of his administrative assistants went out [unintelligible], what the hell would he do?

D: [unintelligible].

P: He'd fire him, wouldn't he?

D: Right.

Plaintiff's Deposition

Exhibit 141

December 8, 1969

MEMORANDUM FOR BOB HALDEMAN

FROM: BRYCE HARLOW

Deputy Secretary of Defense Packard David telephoned December 6 to register a vehement protest against any move in the White House area to require continued use of Mr. Fitzgerald.

He said he would talk with you about this.

BNH: nb

Excerpt From Plaintiff's Deposition
Exhibit 202 [p. 1006]

Pentagon Personnel

[7.] Q. Sir, there are two flagrant instances of intimidation and harrassment and threats against Pentagon personnel who may have divulged information to Congress and to the public about cost overruns and mismanagements and irregular industrial alliances.

These two instances are related because some of the same people are involved. I refer, one, to the Gestapo-like interrogation of Pentagon personnel to see who leaked information to Sarah McClendon [representing several newspapers and news services] for news stories. This involves Barry J. Shillito and Edward [J.] Sheridan.

I also refer to the firing of A. Ernest Fitzgerald, whose divulgement of cost overruns saved the American people $2 billion. His greatest critics were Dr. Robert [C.] Moot and Barry J. Shillito.

Will you do something about this, please, sir?

THE PRESIDENT. Miss McClendon, perhaps I'd better, after the way you put that question.

* * *

Plaintiff's Deposition
Exhibit 235B

PRESIDENT RICHARD NIXON'S DAILY DIARY
(See Travel Record for Travel Activity)

CAMP DAVID, MARYLAND — NOVEMBER 17, 1969
4:15 pm, MONDAY

TIME		PHONE P-Placed R-Received		
In	Out	Lo	LD	ACTIVITY
6:45	6:55	P		The President talked with his Counsellor, Bryce N. Harlow.

Excerpt From
Plaintiff's Deposition
Exhibit 237 [pp. 4-8, 10, 12-13]

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

Dr. K. has cleared*

January 21, 1970

CONFIDENTIAL

MEMORANDUM FOR: MR. HALDEMAN

FROM: JEB S. MAGRUDER /JM/

RE: Mr. A. Ernest Fitzgerald

As you know, the A. Ernest Fitzgerald case continues to be a news item. Our information indicates that he is now working with Ralph Nader and he will be on television numerous times in the next few months. There is also an indication of Congressional activity regarding this matter. The following is the position you should take if you discuss this matter with any individuals outside the White House.

* Handwritten

The Nixon Administration has no quarrel with the subcommittee report on the C5A program and its assertions that the prior Administration did not adequately control military spending. Defense Secretary Melvin Laird has asserted that he is determined to insure that past mistakes in the procurement of this transport aircraft will not be repeated.

The testimony of Mr. A. Ernest Fitzgerald on the cost overruns was no embarrassment to the Nixon Administration, for it involved actions taken under a prior Administration. Conscientious efforts are being made to correct the problems pointed up by an Air Force team that included Mr. Fitzgerald. There is no reason for the Nixon Administration to retaliate

* Handwritten.

against Mr. Fitzgerald, since his testimony dealt with the acts of the prior Administration.

Air Force Secretary Robert Seamans has stated there is no relationship between Mr. Fitzgerald's testimony of November, 1968, and the reorganization decision to abolish his job in October, 1969.

Secretary Laird did discuss with Mr. Fitzgerald how he might be useful to the Defense Department. Mr. Fitzgerald presented a paper to Secretary Laird outlining where he believed he could be most useful and according to Secretary Laird "He did not want to be in any kind of staff position. He wanted to be in an operating position and he felt he could not make a great contribution in any particular area."

Therefore, we should indicate that although no specific job was offered, he had an opportunity to continue working at the Defense Department if he had accepted a staff position. At the same time, it should be kept in mind that in the same testimony Secretary Laird stated that Fitzgerald "was fired" by Air Force Secretary Seamans. He also said that Air Secretary Seamans had "assured me" that Fitzgerald's testimony had no connection with the decision to abolish his job. Consequently, in dealing with outside individuals, be very careful in relating the opportunity Fitzgerald had to stay within the Defense Department.

* * *

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 22, 1970

[Illegible handwritten note]

MEMORANDUM FOR HENRY A. KISSINGER

FROM: William Watts/W/

SUBJECT: A. Ernest Fitzgerald

The attached memo has been approved by Haldeman as the line on Fitzgerald.

You spoke to Secretary Laird about Fitzgerald yesterday.

Could you take a quick reading on this memo?

Approve as is /HK/

Approve as amended ____

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 16, 1970

MEMORANDUM FOR DR. KISSINGER

The January 10 *Chicago Tribune* contained an editorial reporting that somewhere along the line, between the President's reported decision in early December to keep Ernest Fitzgerald and the final moments of his job, the gears failed to mesh. As he cleared out his Pentagon desk, Fitzgerald said that he had been offered no new government job. In previous years the Johnson and Kennedy Administrations suffered from their treatment of another dedicated public servant, Otto Otepka, who also committed the sin of testifying truthfully before a Congressional committee. The equally shabby treatment of Fitzgerald adds no luster to the Nixon Administration.

On reading this the President questioned whether we fumbled this one and asked that you check it out again.

Please submit your comments to the Office of the Staff Secretary.

Thank you.

/s/ JRB
John R. Brown III

THE WHITE HOUSE

WASHINGTON

ACTION MEMORANDUM LOG NO.: P139

Date: Friday, January 16, 1970 Time: 7:30 p.m.

FOR ACTION: Dr. Kissinger cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: Friday, January 23, 1970 Time: 2:00 p.m.

SUBJECT:

President's request that you review the decision on Ernest Fitzgerald.

ACTION REQUESTED:

X For Necessary Action ____For Your Recommendations

____Prepare Agenda and Brief ____Draft Reply Brief

____For Your Comments ____Draft Remarks

REMARKS:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

/JRB/
K. R. Cole, Jr.
For the President

[Gen. Haig FYI]*

THE SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

February 19, 1970

SANITIZED COPY

MEMORANDUM FOR: Assistant to the President for National Security Affairs

SUBJECT: Presidential Requests

In your memorandum of January 19, 1970, you requested information on three matters for the President. These items are discussed in the following paragraphs:

* * *

[3]

Offer of new government job to Earnest Fitzgerald.

— Regarding this third item, you will recall our conversation in December when I called you from Paris. At that time I referred to previous conversations in September at San Clemente. As you know from those conversations, there is no validity to the story that "gears failed to mesh" in the Fitzgerald case.

— Stories such as the 10 January editorial in the *Chicago Tribune* appear to emanate from other White House Staff offices. It would be helpful if you could stop such stories at the source.

/s/ MELVIN LAIRD

---

* handwritten

THE WHITE HOUSE

WASHINGTON

January 24, 1970

HAK **For the Record**

I informed Jeb Magruder that the guidance memorandum on Fitzgerald was concurred in by Henry Kissinger as is.

/W/
WW

Excerpt of Plaintiff's Deposition
Exhibit 248

Recommendation

Mr. A. Ernest Fitzgerald
Department of the Air Force
for
Air Force Association's
Citation of Honor

Table of Contents

1. Specific Justification
2. Draft of Proposed Citation
3. Personal Data
4. Appendices

Specific Justification

During his assignment as Deputy for Management Systems, Mr. Fitzgerald has earned a reputation for technical competence, initiative and dedication to the improvement of resource management within the Department of Defense. He is noted for his vigor, consistently high quality of end product and dynamic leadership. He eagerly accepts the most difficult assignments and has demonstrated an extraordinary capacity to deal with them successfully. His counsel has been actively sought by and freely given to the Air Staff, the Air Force Secretariat, various elements of the Office of the Secretary of Defense, other Government agencies, and representatives of industry on a variety of subjects, some of which are beyond the scope of his ordinary responsibilities. (Appendices B&C)

While Mr. Fitzgerald's overall performance has been sufficiently outstanding to merit the assignment of outstanding performance ratings for successive years, and a nomination by the Secretary of the Air Force for the DOD Distinguished Civilian Service Award (Appendix D), his nomination for this award is based on three specific accomplishments during this calendar year:

1. Development and implementation of a Cost/Schedule Planning and Control System (C/SPCS).

2. Participation in major weapons systems source selection.

3. Distinguished service as the Air Force representative on the DOD/CODSIA Advisory Committee.

Development and Implementation of a Cost/Schedule Planning and Control System

a. Almost from the beginning of his present assignment, Mr. Fitzgerald recognized the need for a reliable and simple system for measuring contractor cost and schedule performance. He was acutely aware of the numerous cost overruns which the Air Force was experiencing, often coupled with failure to meet schedules. Existing management systems were based upon a rigid work breakdown structure which required additional processing on the part of the contractor to provide information in this format. In many instances, the information thus developed bore no resemblance to that developed by the contractor for his own internal management. In addition to the increased cost associated with the development of the information required by the Government, the contractors tended to use inherent differences in data accumulated under the two systems to explain findings by the Government of poor performance.

[2]

b. Mr. Fitzgerald recognized that a system of reporting to the Government which was based upon the contractor's own internal reporting system should provide the Government with increased visibility with respect to contractor cost and schedule performance at a lesser cost than was currently being experienced. He personally encouraged key personnel in the Air Force Systems Command to make a specification, having the above characteristics, part of each major development and procurement contract. Largely, as a result of his personal leadership and encouragement to the Systems Command, the Air Force has been able to implement this "specification" concept well in advance of the related efforts in OSD. By his aggressive leadership, Mr. Fitzgerald has influenced the early

development of a C/SPCS which will be implemented throughout DOD. He has worked diligently to insure that the DOD specification meets the minimum requirements for measurement of contractor performance.

c. Mr. Fitzgerald has personally participated in the orientation required for Government and contractor personnel to insure an understanding of the C/SPCS. He has worked long hours with key management personnel and supervisors alike to provide an understanding of the management concepts involved, and where necessary, technical interpretation of the procedures themselves. His wide experience with aerospace industry operations has enabled him to discuss any aspect of the contractor's process. Over the years, he has developed personal acquaintances in the aerospace industry which cover the spectrum from shop foreman to president. He knows first hand how to resolve possible conflicts and which segments of the contractor's organization must be "sold" to insure successful implementation of the procedures. His prior experience as a management engineer, quality control and cost control technician insures that his technical opinions are highly regarded by both Government and industry representatives. Mr. Fitzgerald personally outlined validation procedures to be used in determining the acceptability of contractor responses under the provisions of the C/SPCS specification. These are now being used as models by Government personnel in insuring proper application of the specification to contractor activities.

d. While Mr. Fitzgerald has not accomplished the development and implementation of the C/SPCS without assistance, it is fair to state that he deserves credit for early adoption of a strong system for measuring contractor performance within the Air Force. It can be further stated that he has exerted a major influence over the procedures now being finalized in OSD.

[3]

Participation in Weapons Systems Source Selection

a. Present Air Force management procedures provide for solicitation of proposals from various contractors for new weapons systems. These proposals are based upon general

guidance furnished by the Air Force with respect to performance characteristics, mission employment, and other technical characteristics. The contractor provides his estimate of the cost of producing these weapons along with refined performance data and a specific time schedule.

b. Mr. Fitzgerald has been assigned to several special Air Staff groups concerned with systems source selection. He has demonstrated a keen understanding of performance characteristics and an ability to probe in depth the cost and economic data that have been furnished by each contractor. His incisive analysis of these proposals has contributed greatly to any element of the decision which is based upon the results of cost effectiveness comparisons. A letter of appreciation for Mr. Fitzgerald's work on the SRAM (AGM-69A) Systems Source Selection is attached. (Appendix E). Due to his outstanding performance on this selection, he was requested by name to participate in the source selection for the Maverick.

Distinguished Service as the Air Force Representative on the DOD/CODSIA Advisory Committee

a. As the Air Force representative on the DOD/CODSIA Advisory Committee, Mr. Fitzgerald has displayed great leadership in presenting to this group the rationale behind the Air Force and DOD requirements for information from industry. He has been able to clearly and effectively answer all questions posed by the industry representatives. He has made a major contribution by bringing into focus issues raised by CODSIA and then providing the information necessary to substantiate the action taken or proposed by the Government.

b. As a result of his experience with contractor operations, he has been able to discuss on an equal basis, all major technical questions concerning industry operations. His familiarity with manufacturing processes, normal organizational alignments and specific features, such as overhead rates, sustaining rates, economic projections, etc., enable him to make a case for improved Government visibility in contractor operations which cannot be refuted.

c. The aggressive leadership, which Mr. Fitzgerald has displayed, marks him as a spokesman for Department of Defense management systems. He has encouraged OSD representatives to display "the courage of their convictions" in finalizing DOD policy. Although somewhat reluctant to provide the kind of information on contractor activities deemed necessary for Air Force/DOD management, industry representatives have conceded the logic and technical soundness of Mr. Fitzgerald's arguments and proposals.

In appreciation of the outstanding contributions of Mr. A. E. Fitzgerald, which are illustrated by the examples provided above, the Air Force is proud to nominate him for the Air Force Association's Citation of Honor.

Proposed Citation

In recognition of his exceptional contribution to the development, installation and utilization of improved management systems throughout the Department of Defense. His dynamic leadership, comprehension of the types of information needed for assessment of efficiency and effectiveness, and vast experience with Aerospace Industry operations, are recognized by colleagues and industry representatives alike. The major contributions which he has made to better resource management reflect exceptional ability, great initiative and an overriding concern for the best interests of the United States Air Force and the Department of Defense.

DEPARTMENT OF THE NAVY
HEADQUARTERS NAVAL MATERIAL COMMAND
WASHINGTON, D.C. 20360

MARCH 6, 1967

Mr. A. E. Fitzgerald
Deputy for Management Systems
Office of Assistant Secretary of the Air Force
(Financial Management)
Washington, D. C. 20330

Dear Mr. Fitzgerald:

Please accept my personal thanks for taking time from your busy schedule to take part in the very fine presentation concerning selected Acquisition Information Management Systems at the recently completed Tri-Service Plant Representatives Conference. I am certain that I am speaking for all the attendees in expressing appreciation to you for sharing your knowledge and experience. Your presence undoubtedly contributed to the overall success of the conference and was truly indicative of its tri-service nature.

Additionally, please pass on my appreciation to LCOL Taylor, and Mr. Stern at USAF Headquarters for their excellent contributions to the agenda in the areas of contractor performance evaluation and MILSCAP.

Sincerely,

/s/ I. J. Galantin
I. J. Galantin
Vice Admiral, USN
Chief of Naval Material

Job Description

Office, Secretary of the Air Force
Assistant Secretary of Air Force
Financial Management
Deputy for Management Systems
GS-301-17

I. Introduction:

The incumbent of this petition will serve as Deputy to the Assistant Secretary of the Air Force for Financial Management with responsibility for the development of improved management controls and broader use of statistical analysis within the Air Force.

II. Duties and Responsibilities:

1. In the capacity of Deputy for Management Systems to the Assistant Secretary of the Air Force, (Financial Management), provides guidance to the Air Staff and the Commands in the development and/or implementation of management information systems.

2. Analyzes and reviews Air Force operational plans, mobilization plans, programs for foreign aid and other data upon which financial requirements for resources are based in order to develop or direct the development of effective management control systems.

3. Develops policies and procedures and monitors the implementation of Air Force statistical programs including methods of analysis and presentation.

4. Serves as an advisor to the Assistant Secretary (Financial Management) while he is appearing before Congressional Committees and personally serves on such committees and boards as specified by the Assistant Secretary.

5. Assure necessary program coordination between the Department of Air Force, Department of Defense and other governmental agencies.

III. Controls Over Work:

Reports to the Assistant Secretary of Air Force (Financial Management). Supervision is limited normally to status reports furnished to the Secretary for purposes of keeping him informed and/or for further guidance and direction.

IV. Other Significant Facts:

This position requires access to TOP SECRET information. Sensitive under paragraph 4b(2)(a), AFR 40-23.

ARMED FORCES MANAGEMENT ASSOCIATION
NATIONAL HEADQUARTERS

839 SEVENTEENTH STREET NW SUITE 207
WASHINGTON DC 20008
TEL 202 838 1838

18 September 1967

Mr. A. Ernest Fitzgerald
Deputy Assistant Secretary, M.S.
Department of the Air Force
5B975, The Pentagon
Washington, D. C. 20330

Dear Mr. Fitzgerald:

On behalf of the membership and our conferees I wish to express sincerest appreciation for your appearance on the program of our Fourteenth National Conference.

Your outstanding talk on cost/schedule planning and control did much to set the tone of the meeting. Judging from the many favorable comments, your message will be long remembered.

I am sure that your presentation has done much to enlighten the attendees, and will accomplish even more in the cause of improved Defense management when published in our forthcoming JOURNAL.

We hope we will have the distinct privilege of having you with us again.

Sincerely,

/s/ William B. Bunker
William B. Bunker
Lieutenant General, USA
President

THE ASSISTANT SECRETARY OF THE AIR FORCE
WASHINGTON

16 February 1967

Dear Ernie:

I am delighted to forward Secretary Brown's letter indicating that you have been nominated for the Department of Defense Distinguished Civilian Service Award. To me, it is most appropirate that you should be recognized in this manner for your contributions, particularly in the area of improved management in the acquisition of major weapon systems, have been for the total Department of Defense, not just the Air Force. Whether or not you in fact receive the award from the Department of Defense, I believe it significant that our Secretary has nominated you as a representative of the Air Force for this unusual recognition.

Congratulations!

Sincerely yours,

/s/ Ted
Leonard Marks, Jr.

Mr. A. Ernest Fitzgerald
Deputy for Management Systems
SAF-FMM
Department of the Air Force

DEPARTMENT OF THE AIR FORCE
WASHINGTON

OFFICE OF THE SECRETARY FEBRUARY 2, 1967

Dear Mr. Fitzgerald:

It was my pleasure to nominate you for the Department of Defense Distinguished Civilian Service Award. The splendid and enviable record reflected by the recommendation submitted on your behalf is a credit to you and the civilian employees of the Federal Government.

Nomination for this award is indeed an honor. You have reason to take pride and satisfaction in your many contributions in the field of financial management which this nomination recognizes.

Sincerely,

/s/ Harold Brown

Mr. A. Ernest Fitzgerald
1552 Forest Villa Lane
McLean, Virginia

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C.

January 17, 1967

REPLY TO ATTN OF: AFRDD

SUBJECT: Appreciation

TO: SAFFM (Mr. A. E. Fitzgerald)

THRU: SAFFM (Mr. Leonard Marks)

1. I am indeed pleased to convey to you expressions of appreciation and commendation which have reached me for our recently completed efforts as members of the Special Air Staff Group (SASG) for the SRAM (AGM-69A) System Source Selection.

2. Secretary McNamara termed the SRAM Source Selection as "exceptionally thorough" and "outstanding" and expressed the wish that his appreciation be extended to all those who had a significant part in it. Secretary Brown asked that his thanks be added to Mr. McNamara's for a job well done and added that such praise from the Secretary of Defense "is not easily earned." General McConnell also requested that all concerned be congratulated for their fine work.

3. Please accept my sincere appreciation and personal thanks for your outstanding contributions throughout the SASG deliberations. Your individual inputs comprised a significant part of the overall effort which has earned such high praise.

/s/ Andrew J. Evans, Jr.,
Andrew J. Evans, Jr.,
Maj Gen, USAF
Director of Development
DCS/Research & Development

Excerpt of Plaintiff's
Exhibit 249
[December 1966]

Mr. A. Ernest Fitzgerald
Department of the Air Force

Table of Contents

1. Personal Data
2. Background Data Supporting Justification for Award
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4. Summary of Consideration Data
5. Job Description
6. Photograph

Personal Data

Name	A. Ernest Fitzgerald
Position Title & Grade	Deputy for Management Systems to the Assistant Secretary of the Air Force (Financial Management)
Organizational Location	Office of the Secretary of the Air Force, Pentagon, Washington, D.C.
Date & Place of Birth	July 31, 1926, Birmingham, Alabama
Residence	1552 Forest Villa Lane, McLean, Va.
Marital Status	Married—Mrs. Nell Fitzgerald three children
Education	University of Alabama B.S. Industrial Engineering, 1951 Post Graduate Work 1951-1952
Honors and Awards	Tau Beta Pi—Engineering Honary Alpha Pi Mu Phi Eta Sigma Civil Service Outstanding Performance Rating—February 1966
Previous Experience	Prior to joining the Air Force in 1965, Mr. Fitzgerald held managerial assignments in industry, worked as a management consultant to major aerospace contractors and government agencies, created and served as president of his own management consultant firm. As president of Performance Technology Corporation, Management Consultants, engaged by the Minuteman System Program Director to develop and implement improved management controls for that program. The results of this effort largely provided the basis for the current development of improved program management concepts being adopted throughout the Air Force.

Management consultant to the Navy on the Mark 48 Torpedo program and the Standard Missile Type program. During this engagement, he was responsible for significant improvements in contractor and Navy management which resulted in substantial cost reductions being realized by the Government in the acquisition of these weapons.

Managing associate and principal in Arthur Young & Company, Certified Public Accountants. Responsible for incorporating industrial engineering techniques into large scale financial control systems which were highly effective in reducing costs and improving operations in clients' commercial and government business.

Senior plant and chief industrial engineer, Kaiser Aluminum Chemical Corp. of Baton Rouge. Responsible for development and adoption of improved inventory control systems by all company plants. Responsible for significant increase in plant operating efficiency through introduction of more effective management procedures.

Member of a management task force at Hayes Aircraft which developed and installed a comprehensive planning, scheduling and costing system for all aircraft maintenance and manufacturing operations.

Supporting Justification for Award

Ernest Fitzgerald's efforts for the Air Force and for the Department of Defense are, and have long been in the most distinguished traditions of government service. His overriding concern has consistently been the best and most permanent interest of the United States, and to this he has devoted

exceptional initiative, outstanding ability, and an unusual breadth of experience. He is by every standard a most appropriate nominee for the Department of Defense Distinguished Civilian Service Award.

Mr. Fitzgerald's responsibilities as Deputy for Management Systems to the Assistant Secretary of the Air Force (Financial Management) encompass an unusual variety of complex and important issues. He serves as the focal point in the Air Force for the development and implementation of resource management systems and serves on several DOD/Industry committees and groups concerned with controlling management systems development in the Department of Defense. His responsibilities also include the analysis and review of Air Force plans and programs upon which financial requirements for resources are based in order to develop or direct the development of effective management control systems. As Air Force representative on the Department of Defense Resources Management Steering Group, Mr. Fitzgerald's unique experience and sincere dedication has provided the primary force behind progress made to date in achieving many of the Department of Defense objectives.

In his designated role of overall resources management program coordinator, Mr. Fitzgerald displayed a remarkable insight with respect to the kinds of problems that had to be resolved, both with respect to Project PRIME and Selected Acquisition Information and Management Systems (SAIMS). This insight into the issues served to alert other Air Force participants in time to develop solutions far in advance of the other Services. An example was his early identification of the need to examine the proposed OSD chart of accounts in relation to OSD program element definitions and output measures. He explained the application of performance measurement concepts to Air Force activities and the relationship of the present Air Force work measurement program to this concept. This approach can be expected to pay large dividends in future years by insuring optimum use of Air Force resources.

In the area of SAIMS, Mr. Fitzgerald's unusual background and exceptional initiative were responsible for the

approach currently being pursued by the Department of Defense for the management of all future major systems acquisitions. This approach calls for the development of a specification, outlining the basic criteria that contractor's internal management systems must meet to satisfy government requirements. Contractors' existing systems are then evaluated against these criteria. Reports to the government, while at a summary level, are derived from the contractors' own system and reflect the true status of the program. The concept of a systems specification in lieu of past imposition by the government of specified systems, which most often resulted in redundant reporting systems at contractors facilities, has been labeled by many as a quantum advance in Defense Management thinking. Under his direction and guidance, the Air Force has taken the lead in the Department of Defense and is already successfully applying this new management approach on several major systems acquisitions.

Because of his demonstrated technical competence, Mr. Fitzgerald has earned the respect of all major aerospace contractors. The status which he enjoys throughout industry has enabled him to gain a degree of acceptance of Air Force and DOD management programs far in excess of that which would have been accomplished by other fully qualified incumbents. His personal acquaintances in industry, which cover the spectrum from shop foreman to president, have provided entrees for other Department of Defense personnel which were of inestimable value in resolving conflicts and in obtaining industry coordination on DOD proposals.

Mr. Fitzgerald has also displayed outstanding leadership in improving the Air Force cost analysis capability as chairman of a committee to evaluate costing and pricing activities of the Air Force. He identified the existing limiting factors and has initiated action to resolve them. Specifically, he has been instrumental in accomplishing a specific delineation of responsibility between the Deputy Chief of Staff, Systems and Logistics, and the Comptroller of the Air Force with respect to cost analysis for planning. Successful resolutions of this relationship will in turn improve the definition of responsibilities within AFSC and other major commands.

He provided essential guidance and analysis in evaluating successive F-111 cost studies which have been prepared for the Secretary of the Air Force. It is generally acknowledged that his incisive review of these cost data contributed to better understanding and acceptance of the Air Force estimates at all levels of the Department of Defense. As a by-product of this effort, Mr. Fitzgerald identified the need to employ revised procedures to be used in the preparation of future systems cost estimates.

Mr. Fitzgerald had undertaken his responsibilities with characteristic vigor and exceptional initiative, and has performed them all ably and with an intense dedication to excellence. He has consistently and gladly accepted the most difficult responsibilities. His counsel has been actively sought by and freely given to the Air Staff, the Air Force Secretariat and other government agencies on a variety of problems outside his ordinary responsibilities.

Based on the above, the Air Force proudly recommends Ernest Fitzgerald, Deputy for Management Systems to the Assistant Secretary of the Air Force (FM), for the Distinguished Civilian Service Award.

Citation to Accompany Department of Defense
Distinguished Civilian Service Award
To
Mr. A. Ernest Fitzgerald

In recognition of exceptional devotion to duty and extremely significant contributions in the development of improved management systems designed to increase resource management efficiency and capability in the Department of Defense. His overriding concern has consistently been the best and most permanent interests of the United States, and to this, he has devoted exceptional initiative, great ability and an unusual breadth of experience. He represents the finest traditions of government service.

Summary

Mr. Fitzgerald's responsibilities encompass an unusual variety of difficult but essential tasks. He exercises general direction of the Air Force development and implementation of management systems, and provides counsel and assistance to the Air Force Secretariat on assigned problems. He is responsible for providing program coordination between the Air Force, the Office of the Secretary of Defense and other government agencies.

Mr. Fitzgerald has exhibited the ability to advance through successive levels of responsible management positions in industry and government as a specialist, middle management, consultant, president of his own firm and Deputy Assistant Secretary. In each instance he has made significant and lasting contributions. His logical approach to problem solutions and his critical, penetrating analysis of each facet of a problem result in constructive recommendations as well as consistent results which are and have been in the best interests of the Air Force and the United States. His capacity for work far exceeds that required or expected and the logic of his efforts is so superior that he has come to enjoy the complete confidence and reliance of his associates and Departmental Secretaries.

An example of the potential benefits to be accrued by the Department of Defense through use of these improved management procedures can be seen in the results of a recent contract competition. The successful bidder, a major aerospace contractor who has adopted these improvements as a direct result of Mr. Fitzgerald's efforts, was able to confidently submit a bid at less than 50% of the government estimate. This substantial saving realized on the Minuteman Program has stimulated a tremendous interest on the part of industry and government concerning future potential benefits.

In consideration of his exceptionally outstanding ability and his significant contribution toward the improvement of resource management procedures in the Air Force, the Air Force is proud to recommend Mr. A. Ernest Fitzgerald for the Department of Defense Distinguished Civilian Service Award.

Excerpt of Plaintiff's Deposition

Exhibit 258 [pp. 456-57]

Firing of Mr. Fitzgerald

[456] MR. MAHON. The testimony of Mr. Fitzgerald of the Air Force has been mentioned in the testimony this afternoon. I would hope that the Secretary of Defense and the Department of Defense, including all the military services, would cooperate with any man in or out of the Department, or in and out of the Government, in an effort to save money and promote efficiency.

Has Mr. Fitzgerald committed any act of disloyalty or anything inappropriate?

SECRETARY LAIRD. I am really not the best witness on that. To my knowledge, Mr. Chairman, he has not.

MR. MAHON. If he is the man who helped to uncover the C-5A overrun, it would seem that he would be the type we ought to encourage and if the Air Force wants to let him go we ought to use him in some other capacity in the Department of Defense to help us to locate cost overruns and promote efficiency. This would be in keeping with your determination to eliminate overruns.

SECRETARY LAIRD. I talked to him, Mr. Chairman, as I said earlier, about his possible usefulness in the Department of Defense. I had [457] him prepare a paper for me as to where he could be useful as far as the Department of Defense is concerned, if he had difficulty in the Air Force.

That paper was presented to me as an outline of where he could be useful, and really the conclusion was that he did not want to be in any kind of staff position. He wanted to be in an operating position and he felt that he could not make a great contribution in my particular area. I feel that the decision as to the reorganization of the Office of Financial Management made by Secretary Seamans is a decision which should be made by him. It is perfectly within his responsibilities, and I will certainly support his decision to reorganize that office.

I want to make it clear that I happen to believe that Mr. Fitzgerald's position on the C-5A cost overrun has been correct.

Now, I know that this committee has long been concerned about the overrun problem and I was sitting right across the table when this was developed.

MR. ANDREWS. You helped overrun it—I mean bring it out.

SECRETARY LAIRD. It was closely held by the Department of Defense in the past.

MR. ANDREWS. Mr. Flood and I have collaborated on three questions that we would have asked. First, was there an overrun? That has been answered.

Second, did Mr. Fitzgerald discover the overrun or bring it to light? That has been answered.

MR. MINSHALL. It should be made clear though we brought out a C-5 overrun in this committee in 1968. It's in last year's testimony if I remember correctly.

MR. ANDREWS. I understand, but Mr. Fitzgerald, as I understand the Secretary's testimony, had something to do with announcing the overrun.

SECRETARY LAIRD. He announced it in November in a public session of the Joint Economic Committee.

MR. ANDREWS. Now, the third question we would have asked: Was he fired?

SECRETARY LAIRD. He was fired.

MR. ANDREWS. Did his disclosure have anything to do with his being fired?

SECRETARY LAIRD. The Secretary of the Air Force has assured me that it did not.

MR. ANDREWS. He was fired for other reasons?

Reduction in Air Force Headquarters Staff

SECRETARY LAIRD. Because of the reorganization of the Office of Financial Management, and a reduction in force and as far as the Air Force is concerned—and I want this understood—the Air Force staff in the Washington area has been reduced by 857 employees. There are people who are going to be complaining about being let out, but there are 856 others that are also involved in this reduction. It isn't easy to cut back on civilian people and particularly in the Washington area.

MR. MAHON. It is very desirable, Mr. Secretary, if the personnel are not needed.

* * *

Defendants' Deposition

Exhibit 40

THE WHITE HOUSE

WASHINGTON

November 17, 1969

MEMORANDUM FOR THE PRESIDENT

THROUGH: Bryce Harlow /BH/

FROM: Clark Mollenhoff /Clark/

SUBJECT: The Dangers Involved in the Air Force Decision to Abolish the Job of Mr. A. Ernest Fitzgerald

The abolition of the job held by Mr. Fitzgerald has been pictured in the press as "the firing" of this man for giving honest testimony on the cost overruns on the C5A program.

Unless there are clear and overwhelming reasons why Mr. Fitzgerald should be fired, this decision should be modified in some manner to avoid most serious embarrassment to Secretary Laird and the White House. In my judgment, this decision is likely to plague the Administration for months. Senator Proxmire, and those in the press and Congress who are sympathetic to Mr. Fitzgerald, will try to escalate this controversy in the days and weeks ahead. This will result in persistent questioning of Secretary Laird in press conferences. This is certain to be followed by a similar pattern of questioning at Presidential press conferences.

I do not believe this matter was well handled by the Air Force in the first instance, for it should have been recognized that this case represents particularly sensitive problems. I am aware of the general Air Force contention that Mr. Fitzgerald's record justifies termination of him and abolition of the job. I am also aware that a friction has developed over a period of many months that would make it most difficult for Mr. Fitzgerald to continue in his present position with the Air Force. Also,

I am told that his superiors believe he is the source of information that has been leaked to the Proxmire committee. Without going into the merits of the Air Force complaints about Mr. Fitzgerald, it is obvious that there must be a clear and overwhelming case against him if the Air Force is to try to remain in the present posture. It is my best information that no such overwhelming case can be made. As I see this matter, the Administration has the following alternatives:

1. To remain firm in the present posture and meet the storm that is certain to be stirred by the Washington Post, the New York Times, and the TV networks. There will be every effort to paint the Administration as engaged in a firing to appease the military industrial complex. It will be difficult to get through with any contrary views.

2. The Air Force can remain in the present posture and prepare an aggressive assault upon Mr. Fitzgerald because of his reported deficiencies and activities that displease his superiors. If that case is strong enough to show Mr. Fitzgerald is not a good public servant, then this course might be acceptable, but my own view is that there has been some misjudgment at the Air Force Secretary level as to how strong the case is against Fitzgerald.

3. The Administration can arrange to move Mr. Fitzgerald to some other job in the Defense Department that has real duties and real responsibilities and that demonstrates there is no disposition on the part of the Administration to penalize Mr. Fitzgerald for testifying on the C5A. Such a move should be accomplished by clear exchanges of letters that demonstrate that Secretary Laird and the Air Force Secretary have had good and sufficient grounds for terminating Fitzgerald's job and stating that it was totally unrelated to the testimony he gave on the C5A. This exchange of letters should try to set out Mr. Fitzgerald's qualifications in perspective with the commendation for his testimony on the C5A, as well as a brief statement on any deficiencies that are provable in connection with other duties. This plan would have the

advantages of removing Mr. Fitzgerald from the Air Force area where there is obvious friction that would interfere with his performance of duties there and transfer him to other work where his talents might be properly utilized. If there is concern over his loyalty to the present Defense leadership, he should be assigned to studies that deal with problems of the Kennedy-Johnson Administration where there should be no reason for conflict with this Administration.

The C5A and the Fitzgerald matter are problems that come out of the McNamara-Clifford direction of the Defense Department, and this Administration should take every step to make certain that we do not adopt these problems of an earlier era. We will probably have enough problems of our own to deal with without borrowing trouble from Mr. McNamara's regime.

I am ready to take any steps you believe are necessary to try to iron this out.

1. Call Air Force Secretary then Al Haig re quare present intentions.
2. Call Mollenhoff

Defendants' Deposition

Exhibit 42

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 5, 1969

MEMORANDUM FOR THE PRESIDENT

FROM: Clark Mollenhoff /Clark/

SUBJECT: The Fitzgerald Case

The Administration position on the Fitzgerald case is untenable and can only become worse as the Proxmire investigation proceeds.

The Fitzgerald case has come under the broadest editorial attack from conservative as well as liberal newspapers. These attacks range from those in the Washington Post and the Milwaukee Journal on the liberal side, to those in the Omaha World Herald and The State newspaper published in Columbia, South Carolina, on the conservative side. Conservative writers compare it to the Otepka case.

Fitzgerald is pictured as a man "fired for giving truthful testimony to Congress." These attacks come from conservative Republicans to liberal Democrats. The closer the record is examined the worse the record looks. The testimony of Air Force Secretary Robert C. Seamans and Assistant Secretary Spencer Schedler appears ludicrous on its face. Even if the testimony is true, it still lacks credibility on dozens of points. It will be virtually impossible to persuade any responsible Republican to defend what has been done. Presidential defense of this record could be disastrous.

See attached suggestion for Presidential action and position.

Attachment

December 5, 1969

Suggested Presidential Position on the A. E. Fitzgerald Case

The Administration has no quarrel with the Senate Subcommittee report on the C5A program asserting that the prior Administration "has not been adequately controlling military spending." It can be noted that Defense Secretary Laird stated he is "determined to ensure that past mistakes in the procurement of this transport aircraft will not be repeated."

The following points should be made:

1. C5A cost problems were inherited from the Johnson Administration, and Fitzgerald's testimony on cost overruns was no embarrassment to the Nixon Administration. Conscientious efforts are being made to correct the problems pointed up by an Air Force team that included Mr. Fitzgerald.

2. There is no reason for the Nixon Administration to retaliate against Fitzgerald. Air Force Secretary Robert Seamans says there was no relationship between Fitzgerald's testimony of November 1968 and the reorganization decision to abolish his job in October 1969.

3. There is an unfortunate erroneous public impression that Nixon Administration appointees abolished Fitzgerald's job as retaliation for giving testimony on scandals of a prior Administration. This arises from an extensive record on complicated contract decisions and personnel decisions.

4. To correct the record and to prove good faith, I am directing the Secretary of the Defense to offer Mr. Fitzgerald a proper post to use his talents in the fight to control Defense spending.

It is important to take this extra step to avoid any mistaken public impression that the Administration would be a party to retaliation against a man who gave testimony dealing with Defense waste. The job must meet these tests:

1. A bonafide job offer, not make work.

2. On the same level.

3. In an area where old personnel frictions arising from the long controversy on C5A will not impede Mr. Fitzgerald's future contribution.

Defendants' Deposition

Exhibit 101

December 4, 1969

MEMORANDUM FOR JOHN EHRLICHMAN

We will need for the President's Briefing Book, hopefully sometime Friday before noon, answers to possible questions about:

1. Loopholes in the Draft Law
2. The President's position on the "youth wage"
3. The President's position on the OEO Amendments
4. The President's position on Federal assistance to medical research and medical schools. Where is the money?
5. Our position on this fellow we fired who is filing suit against the President's decision to oust him.

Thanks.

PAT BUCHANAN

Defendants' Deposition

Exhibit 108

A. Ernest Fitzgerald

Q. Mr. President: Did this Administration fire Mr. A. Ernest Fitzgerald? And are they willing to take him back?

A. I don't think "firing" would be the accurate characterization at all. The suggestion that this Administration somehow retaliated against Mr. Fitzgerald is erroneous. The cost overruns on the C-5-A and in other defense programs—brought to light by the team which Mr. Fitzgerald worked with, are no embarrassment to this Administration. Every revelation dealt with actions, decisions, and contracts made under Secretary McNamara, not under Secretary Laird.

As for the new post, I believe some discussions were held with the Defense Department, but Mr. Fitzgerald has taken a post elsewhere.

Defendants' Deposition

Exhibit 109

December 8, 1969

MEMORANDUM TO THE PRESIDENT

FROM: PATRICK J. BUCHANAN

The President should know that Defense has sent me Q and A on the Fitzgerald matter which in effect re-states the President's full confidence in Secretary Laird, and which says that in this matter, the President is relying on Laird's and Seamen's judgment. As the President is aware, Mollenhoff disagrees strongly with this position; and from a public relations standpoint—I think the President would do himself well if handled it in the way suggested in the previous question—and if we told Laird that this is what we are going to do, if asked.

Defendants' Deposition
Exhibit 110

THE WHITE HOUSE
WASHINGTON
December 5, 1969

Churchill quote*

MEMORANDUM FOR H. R. HALDEMAN

Attached are additions for the President's Briefing Book.

PAT BUCHANAN

Fitzgerald

reinstate.*

* Handwritten.

MEMORANDUM TO THE PRESIDENT

FROM PATRICK BUCHANAN

RE THE FITZGERALD CASE December 5, 1969.

Mr. Fitzgerald's job at Defense has been abolished. He is the man who is given credit for uncovering and revealing the cost-overruns on the C-5-A. The Pentagon is catching hell from liberals and conservatives for firing a guy whose only crime seems to be that he was an aggressive investigator who found mistakes in the procurement of the transport which cost billions.

In PR terms we are getting a beating, and why should we?

Mollenhoff's investigation finds that the guy is a good public servant, and he has the public behind him. Why should we purge him—simply to make the bureaucrats at the Pentagon happy?

Mollenhoff's suggestion to you (with which I agree) is that the President say, if asked:

> "It is true that Mr. Fitzgerald's job is being abolished, but it is not because of his performance in it; he has, to my knowledge, been a dedicated and effective public servant. After looking into it, I have decided to direct the Defense Secretary to find Mr. Fitzgerald another position, of equal pay and stature—not a make-work job—where his talents can continue to be used by this Administration."

Making the President appear to be a just man is worth ticking off the fellows out to get this guy. (*Note:* The Service Secretaries are on the television Sunday, and it might be well if RN is to take this position, to inform them of it.)

Defendants' Deposition

Exhibit 112

THE WHITE HOUSE

WASHINGTON

December 5, 1969

MEMORANDUM FOR THE PRESIDENT

FROM: Clark Mollenhoff /Clark/

SUBJECT: The Fitzgerald Case

The Administration position on the Fitzgerald case is untenable and can only become worse as the Proxmire investigation proceeds.*

The Fitzgerald case has come under the broadest editorial attack from conservative as well as liberal newspapers. These attacks range from those in the Washington Post and the Milwaukee Journal on the liberal side, to those in the Omaha World Herald and The State newspaper published in Columbia, South Carolina, on the conservative side. Conservative writers compare it to the Otepka case.

Fitzgerald is pictured as a man "fired for giving truthful testimony to Congress." These attacks come from conservative Republicans to liberal Democrats. The closer the record is examined the worse the record looks. The testimony of Air Force Secretary Robert C. Seamans and Assistant Secretary Spencer Schedler appears ludicrous on its face. Even if the testimony is true, it still lacks credibility on dozens of points. It will be virtually impossible to persuade any responsible Republican to defend what has been done. Presidential defense of this record could be disastrous.*

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Attachment

* Underscoring is handwritten.

December 5, 1969

Suggested Presidential Position on the A. E. Fitzgerald Case

The Administration has no quarrel with the Senate Subcommittee report on the C5A program asserting that the prior Administration "has not been adequately controlling military spending." It can be noted that Defense Secretary Laird stated he is "determined to ensure that past mistakes in the procurement of this transport aircraft will not be repeated."

The following points should be made:

1. C5A cost problems were inherited from the Johnson Administration, and Fitzgerald's testimony on cost overruns was no embarrassment to the Nixon Administration. Conscientious efforts are being made to correct the problems pointed up by an Air Force team that included Mr. Fitzgerald.

2. There is no reason for the Nixon Administration to retaliate against Fitzgerald. Air Force Secretary Robert Seamans says there was no relationship between Fitzgerald's testimony of November 1968 and the reorganization decision to abolish his job in October 1969.

3. There is an unfortunate erroneous public impression that Nixon Administration appointees abolished Fitzgerald's job as retaliation for giving testimony on scandals of a prior Administration. This arises from an extensive record on complicated contract decisions and personnel decisions. *

4. To correct the record and to prove good faith, I am directing the Secretary of the Defense to offer Mr. Fitzgerald a proper post to use his talents in the fight to control Defense spending.

---

* Handwritten note in margin at this point: "briefing book this afternoon."

It is important to take this extra step to avoid any mistaken public impression that the Administration would be a party to retaliation against a man who gave testimony dealing with Defense waste. The job must meet these tests:

1. A bonafide job offer, not make work.

2. On the same level.

3. In an area where old personnel frictions arising from the long controversy on C5A will not impede Mr. Fitzgerald's future contribution.

Defendants' Deposition

Exhibit 113

[January 1970]

* * * *

Fitzgerald

Despite surface indications that the Nixon Administration might be different, Ernest Fitzgerald learned the truth of an old government adage—never rock the boat. Don't buck the bureaucracy. If you do, they'll get your job. Somewhere along the line, between the President's reported decision in early December to keep Fitzgerald and the final moments of his job, the gears failed to mesh. As he cleared out of his Pentagon desk, preparing to go into business as a private consultant, Fitzgerald said he had been offered no new government job. In earlier years the Johnson and Kennedy administrations suffered from their treatment of another dedicated public servant, Otto Otepka, who also committed the sin of testifying truthfully before a Congressional committee. The equally shabby treatment adds no luster to the Nixon Administration. It can only be a victory for the entrenched Pentagon bureaucrats. (1/10 *Chicago Tribune* editorial)

* * * *

H—I wonder if we fumbled this one—check it out again [Check mark—/JRB/]*

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* Handwritten.

Defendants' Deposition

Exhibit 135

PLEASE TREAT AS CONFIDENTIAL

May 29, 1969

MEMORANDUM FOR: MR. EHRLICHMAN
COLONEL HUGHES

SUBJECT: Mr. A. Ernest Fitzgerald

It has just come to my attention—by word of several mouths, but allegedly from a senior AFL-CIO official originally—that a civilian named A. Ernest Fitzgerald, presumably employed by the Department of the Navy, is about to blow the whistle on the Navy by exposing to full public view that service's "shoddy purchasing practices." Evidently, Fitzgerald attended a recent meeting of the National Democratic Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic.

I believe that this information has been passed already to Bill Sullivan at Justice (FBI), but I thought I should alert each of you to the facts as they were presented to me.

ALEXANDER P. BUTTERFIELD

NOTE: Elmer Juanich has just brought to my attention the fact that an A. E. Fitzgerald is listed in the current Pentagon telephone directory as being assigned to SAFFM (Office of the Assistant Secretary of the Air Force/Financial Management.)

PLEASE TREAT AS CONFIDENTIAL

Defendants' Deposition
Exhibit 143
[Entire exhibit is handwritten.]

re troop anncmt. maybe not on TV

no major things to say other than anncmt.

anncmt on Tues—by statement—no appearance

P. Hope—Armstrong

Har P. likes Colson as coord.—*not* Macomber

Bryce as strategist.

E. Need to see Cab. officers

Bkfst. No prayer—just music

E. Schlesinger—put Fitzgerald in Budget on non-defense problems

Defendants' Deposition
Exhibit 150

12-23-69

[President] Mayo Schlesinger E

1. Mollenhoff Rec. C.P. *re* Ill.
2. Roger Lewis
3. (Hexagon) Hidden over-runs
4. Fitzgerald—don't hire
5. Tax on polluters

New taxes—[illegible]

6. Stockpile sales—message—omnibus bill

Defendants' Deposition

Exhibit 151

December 30, 1969

MEMORANDUM FOR CLARK MOLLENHOFF

cc: Bob Haldeman

The President has decided not to insist upon finding a position in government for Mr. Fitzgerald.

JOHN D. EHRLICHMAN

Defendants' Deposition

Exhibit 163

January 3, 1970

MEMORANDUM FOR LARRY HIGBY

Please find out the status of Fitzpatrick, the guy they fired at the Defense Department. Has he been put into a post in Budget as the President directed? What is the post, etc. If he has not been, let me know what his current status is and what plans they have for him.

After I get this report you should remind me that the President wants Ziegler to call in Sara McLyndon and tell her what we have done with Fitzpatrick.

H.R. HALDEMAN

HRH:pm

Defendants' Deposition

Exhibit 165

[illegible]

5:50 p.m.
/pm

Upon talking to the Press yesterday, his last official day at the Pentagon, Fitzgerald said that contrary to recent speculation in the Press, he was not going to work for the Federal Government . . . but instead was going to work in the private consultant business.

Fitzgerald did ask that his security clearance not be taken away in that he had hopes of using it in his future work.

Alex's Remarks

Let's let him bleed for awhile. He is 100% disloyal—not without expertise in his field, but nonetheless 100% disloyal. His parting words to the Administration appeared in this morning's Washington Post—they were in essence, "the big dogs will be all right in this Administration, but the little people never will."

If there is still some plan to pick up Fitzgerald and bring him into the Federal Government structure, we should certainly not do it right away. I say this for two reasons:

1. It would be admission of error on our part.

2. Senator Proxmire and others who have made a hero of Fitzgerald deserve first choice. Let's wait awhile and see if they pick him up.

Defendants' Deposition

Exhibit 169

[Entire document is handwritten]

B—When family

Now: RN. PN.

Family need

When specific request.

Reminder of Categories.

[illegible] of Election day. Who did we send staff to. Do we need to do for [illegible] also.

Alex—Fitzgerald—what happening on this.

Phone Call Program—

Local outreach—Planned program of contact. If we can get list then what do we do.

Do thinking on their own. Then what do we say when we call.

Often do phone calls instead of appt. [illegible] phone calls. Appts. we accept can't we do then as phone calls.

What do we have now in the way of phone list. Chapin get copies of list. Keep in touch with key leadership types in Bus, financial, political communities. Next Monday.

Defendants' Deposition

Exhibit 170

CONFIDENTIAL January 7, 1970

MEMORANDUM FOR H. R. HALDEMAN

FROM: LARRY HIGBY

SUBJECT: Fitzgerald

Attached at Tab A are Alex Butterfield's remarks on the Fitzgerald situation. In summation it indicates that Fitzgerald is not going to work for the Federal Government and that we should not make any attempt to hire him.

I talked to Director Mayo last night and he indicated that the decision had been made approximately a week ago not to bring Fitzgerald into the Bureau of the Budget. Apparently this came about as a result of the discussion between Ehrlichman, Mayo, and the President during a Budget session. In that session Mayo raised the point that to bring Fitzgerald into the BOB would be like bringing a pipeline for Proxmire into the BOB. The President said that was completely right and that we certainly didn't want to do that and to just forget the idea of bringing Fitzgerald into the BOB.

In addition I spoke with General Haig. He indicated that negotiations had begun on offering Fitzgerald some other positions at BOB, but that Fitzgerald had never followed up on them.

In summation, it looks like Fitzgerald is leaving the government and no plans are being made to accommodate him anywhere. Before finalizing this conclusion, however, I would suggest that you might want to speak to John Ehrlichman on this matter.

Attachment

LH:pm

Defendants' Deposition Exhibit 172
Transcript Of Part Of A Conversation
Between Richard Nixon
And Ronald Ziegler
4:50-5:15 P.M. February 26, 1973
Old Executive Office Building

Ziegler: Clark Mollenhoff.

President: Oh, yeah? What's he want? [Unintelligible]?

A: Well, he is pushing the case of, of, uh, Fitzgerald—

P: Yeah.

Z: —and, uh, I don't burden you with the details but he says that one of the generals who testified at the Civil Service Committee hearing indicates that his investigative record showed that Fitzgerald was cleared in May of 1969. Clark then goes on to point out in his letter to you that he gave me that when he was here serving as your special counsel—

P: Yeah.

A: —that the Air Force came into his office and [unintelligible] here at the White House in December of 1965, '69, many months later and indicated that Fitzgerald was still under a question—

P: Yeah.

Z: —of conflict of interest and so forth.

P: Right, right.

Z: The point of his letter is that—

P: He wants—

Z: —he feels—

P:—[unintelligible].

Z: —something should be done.

P: Yup.

Z: He, he wants, feels that something should be done about the Fitzgerald case and if not, uh, he feels that he is compelled to testify before the Civil Service hearing.

P: Right, right—. Well, but wait a minute, he's got, uh—

Z: See, which, which—

P: —executive—

Z: —would—

P: —privilege.

Z: —which would mean that he would be testifying before the Civil Service hearing on information that he obtained while he was working in the, for the President of the United States. He says—.

P: He didn't get it from me, though.

Z: No.

P: Did he?

Z: And he, Clark, I don't think understands executive privilege 'cause he points out in here that he, that, he said, "As I know, as you know, I disagree with the President the issue on executive privilege and would not avail myself, uh, of it, un, under, under any circumstances. [Unintelligible]."

P: Oh, hell, let's let it go. What were the, uh, what is the situation on the case? I don't really have any, uh—

Z: Well, I don't want—.

P: —interest in it whatever.

Z: What I would like to do—

P: Yeah.

Z:—is because he has this letter and he said—

P: Right.

Z: —you know, I uh—

P: Yup.

Z: —told him that I—

P: Sure.

Z: —have seen the—

P: Sure, sure.

Z: —President. Is to have John Dean call Clark in—

P: Yeah. Right.

Z: —at your request—

P. Right.

Z: —and simply put the facts on the Fitzgerald case and see what—

P: Tell him the President wants him to—

Z: —to do.

P: —to get the facts and see what the situation is and, uh, we'll, uh, and if, bu-but it would be best if he not raise it in a, uh, [unintelligible].

Z: That's what I think.

P: [Unintelligible]. He should call him into [unintelligible].

Z: All Right, I will. I'll call Clark now.

P: Yeah. And say, "Look, that the President [unintelligible] about it and said, 'Look, that he had no particular recollection of the, of, uh, of the matter we [unintelligible] the other day. [Unintelligible] this guy he's [unintelligible] what [unintelligible] we've got the Air Force guy [unintelligible].' "

Z: You see, this is a case of, that, that, uh—

P: Came before we—.

Z: —came before we came in—

P: Oh, yeah.

Z: —but when we came in it was all Harlow's ball game [unintelligible]. I had a call in to Bryce on it.

P: Bryce was all for canning him, wasn't he?

Z: No, I think Bryce may have been the other way. That's why I [unintelligible]—.

P: Oh.

Z: See, at one point in '69—

P: Oh.

Z: —there was some discussion about hiring Fitzgerald over here at OMB—

P: Oh.

Z: because it was felt that he did get a bum rap over there.

P: Oh, see?

Z: But I—.

P: You see, the case I was thinking about, when you asked me, was the other case—

Z: Rule.

P: —the Rule case, that's right. I thought [unintelligible]—.

Z: Which we can't say, of course.

P: I can't go [unintelligible].

Z: And that's the one that, uh, that Admiral Kidd did such a great job in handling—

P: Yeah, yeah.

Z: —but Clark being such a zealot, as he is—.

P: No, well, he may be right.

Z: He might be right.

P: That's what I wanna tell him. The President has made, he says he may be right and says to get to the bottom of it. We'd like for him, "the President asks that you [unintelligible] talk to Dean and he says that the President has some recollection that Harlow has some information on it. Why don't you talk to Harlow and then, to, uh, present the facts to me? And I'll see what we could do."

Z: All right.

P: "[Unintelligible] the President's taken a personal interest in it." I don't want him to write [unintelligible]—

Z: Oh, no.

P: —but he can later. Tell him that—

Z: On a private basis.

P: —that he's privileged to write it later, but I, uh, I said that I felt that I was [unintelligible] going to get [unintelligible] to the bottom of this case, tell him [unintelligible] did, we did [unintelligible]—

Z: Yeah.

P: —you know, uh—

Z: OK.

P: —uh, [unintelligible] and ask, tell him I'd be interested in his personal evaluation of, he thinks he's [unintelligible].

Z: Yup.

P: [Unintelligible].

Z: In spite [unintelligible].

P. All right. Fine. Tell him—.

Z: He sent you a call in [unintelligible]—

P: Yeah.

Z: —[unintelligible] tomorrow about a Kent Cook, retired Air Force weapons analysis who died of a heart attack in '54, and Clark said that [unintelligible] living on a very low salary in terms of this whole bureauc—. See, Clark had a—

P: Who was Kent [unintelligible]?

Z: —[unintelligible]—.

P: Did we do it?

Z: No, we didn't do it.

P: Jesus Christ.

Z: That this is one of these—.

P: Well, Clark [unintelligible]. You gotta remember that he, uh, also in fairness to, Ron, Clark, uh, you [unintelligible].

Z: Well, I [unintelligible].

P: [Unintelligible] Clark does, uh, also one of those fellows that, tries to, tried to defend that other, that, that State Department, you remember that guy that we put on, uh, [unintelligible] no, he had, I think he was with Willard Edwards on that case. You remember that case?

Z: I don't remember the name.

P: Well, the one that involved, uh, the, the fellow that they canned at the State Department, you know, because he, uh, conducted security [unintelligible]. Remember we put him on the [unintelligible]?

Z: Oh, yeah, [unintelligible] Tucker.

P: [Unintelligible]. Put Tucker in.

Z: [Unintelligible].

P: Well, just say the President has said that this, this intrigues him. The case intrigues him and he thinks Clark's an honest reporter and he wants the facts and he's asked Dean to get the facts and also discuss executive privilege with him. Well, to get the facts. He'd also like for him to get, [unintelligible] he wants Harlow, and get Harlow [unintelligible] on it. Now, we're not, we're not, uh, we, uh, this is not [unintelligible] no skin off our backs. We just wanna know the facts, but he must not write it until we get the facts. Then I'll look at it. That it'll be per— [unintelligible]. When they get, Dean gets it properly presented, it will be presented to me and I'll make a judgment on it myself.

Z: All right.

P: Fair enough?

Z: That's good.

P: And he's, I thought, and I said, [unintelligible], "Well, the President's expected to take a personal interest in the [unintelligible], and he's decided to [unintelligible] on this

himself. You can't write it yet. First talk to Dean. He also'd like you to talk to Harlow. Both Dean and Harlow we will ask for an opinion on it. And we'll [unintelligible] get, get the Air Force's, uh, judgment [unintelligible]. Get their side of it too, and, uh, uh—."

Z: The reason I raise this in this manner [unintelligible]—.

P: Well—.

Z: I just don't want him to hit you [unintelligible].

P: [Unintelligible]. Well, you say, "This is, this is very interesting, and uh—."

Defendants' Deposition

Exhibit 181

THE WHITE HOUSE

WASHINGTON

CONFIDENTIAL Date 12/9

TO: MOLLENHOFF
FROM: BOB HALDEMAN

FYI _X_ PLEASE HANDLE _____

PLEASE REVIEW AND SEE ME _____

OTHER: The P. has asked Mayo to bring Fitzgerald into the Budget Bureau to work in non-defense areas.

H.

Exhibit 84
To Plaintiff's Third
Request For Admissions

THE WHITE HOUSE

WASHINGTON

February 2, 1970

good job*

Keep it up*

MEMORANDUM FOR THE PRESIDENT

Following is a report on the actions completed in response to your requests during the week of January 26 to February 2.

1. Request that Harry Dent submit analyses of Senators Prouty, Stevens and Ralph Smith.

   ACTION—Mr. Dent's report was sent to you on January 29.

2. Request that John Ehrlichman have Dr. McCracken and Dr. Burns assess the recent statement that the U.S. is headed for a recession.

   ACTION—Mr. Flanigan reports that Dr. McCracken discussed this with you on Saturday, January 31.

3. Request that John Ehrlichman appoint a group to submit a plan for school integration which provides decent education for all.

   ACTION—A Presidential memorandum was sent to the Vice President requesting that he chair a group to develop political and programmatic plans to help southern communities maintain a decent system of public education while wrestling with the problem of complying with the Supreme Court decision on desegregation. (Tab A)

* Handwritten, beneath a check mark.

4. Request that John Ehrlichman prepare an information kit on our drug program.

   ACTION—Mr. Ehrlichman's report on the preparation of the kit is attached at Tab B.

5. Request that Bryce Harlow contact Les Arends to help resolve the Congressional GOP-Southern Democratic conflict.

   ACTION—Mr. Harlow reports that although Les Arends strongly discounts this conflict, he will very gently check it to see what he can find. (Tab C)

6. Request that Bryce Harlow prepare a note to Senator Baker for his support of RN's State of the Union address.

   ACTION—A copy of the letter sent to Senator Baker is attached at Tab D.

7. Request that Bryce Harlow draft a congratulatory letter to Senator Henry Jackson on his selection for the 7th Annual Congressional Award to the VFW.

   ACTION—A copy of the letter sent to Senator Jackson is attached at Tab E.

8. Request that Bryce Harlow draft a letter to Congressman Anderson congratulating him on a good rebuttal to Senator McGovern's "baby bonus" proposal.

   ACTION—A copy of the letter sent to Congressman Anderson is attached at Tab F.

9. Request that Dr. Kissinger submit an analysis of the significance of President Thieu's recent shake-up involving two of his generals.

   ACTION—Dr. Kissinger's report was sent to you on January 26.

10. Request that Dr. Kissinger review the decision on Ernest Fitzgerald.

ACTION—Jeb Magruder's report on Mr. Fitzgerald is attached at Tab G. Dr. Kissinger feels no further action is necessary.

11. Request that Dr. Kissinger make every possible effort to ensure that we host the 1976 Olympics.

ACTION—A copy of Dr. Kissinger's memorandum to Secretary Rogers initiating action on this request is attached at Tab H.

**Attachments to Plaintiff's
Opposition to Defendant
Nixon's and Defendant Harlow's
Second and Defendant Butterfield's
Third Motion for Summary Judgment**

Attachment A

9 January 1968

MEMORANDUM FOR SECRETARY BROWN:

During the past seven years, OSAF has followed a consistent policy of intensive improvement of our major acquisition management systems. As a joint effort, staff specialists in OSAF, the Air Staff and the Major Commands have formulated approaches with great potential for improving management of these major acquisitions. The Air Force leadership in this area has been recognized by OSD by the adoption of a number of the Air Force developed methods throughout OSD.

To assist in capturing the full benefit of the past years of work, we should now focus additional attention on cost performance.

As we recently discussed, I suggest that my Deputy for Management, spaces be established as the focal point for this effort. Initially, the assignment of the military space and one civilian space should be sufficient to assist Ernie Fitzgerald's office in this endeavor. We will review the requirement for people as the work proceeds, but it is my hope that this effort will be picked up by the Air Staff and Major Commands thereby obviating the need for additional people in this office.

Ernie and I believe our initial efforts should be directed to Minderson. Ernie's long experience with this program and knowledge of the cost information available will be invaluable to the personnel assigned to this task. We are pleased with the action the SFO has initiated on Cost Performance, but we firmly believe we can provide substantial help in bringing meaningful direction to the SPO's efforts.

Additionally, an Automated Proposal Evaluation System, APES, (formerly CPA) is an active computer-oriented cost-analytical technique—is available within the Minuteman SPO for capturing and storing for later use the massive procurement cost data.

Attached to Author background are two names by Ernie which outline his assessment of the job to be done. Ernie and I would be pleased to discuss this matter further at your convenience.

Within the next few days, I will submit a similar memo requesting additional people for assignment to Major Pewitt's office.

Thomas Nielsen
Assistant Secretary of the Air Force

Attachments

Attachment B

DEPARTMENT OF THE AIR FORCE

WASHINGTON 20330

January 10, 1968

MEMORANDUM FOR MR. NIELSEN, SAFFM

After reading your memorandum of 9 January 1968 concerning additional manning for the office of your Deputy for Management Systems, Dr. Brown made the following comments re the penultimate paragraph:

"Tom,

I agree that this area needs attention badly, that your office is the place to do it, and that the Deputy for Management Systems is a proper focal point. I remain concerned about adding net people to OSAF or any office thereof. I would therefore, in line with our discussion last month suggest you determine the net requirements for the cost control job and systems analysis job, see where there may be offsetting decreases in ASAF(FM), see how far you can use long-term loans from the Air Staff to avoid adding slots. Please go over this with John Lang (showing him these comments) and then discuss with me as you suggest. Also, you should go ahead and prepare the necessary description of functions for John Lang's office to issue when we decide to proceed.

HB"

Would you take appropriate action, please.

/s/ BRIAN GUNDERSON
Brian S. Gunderson
Colonel, USAF
Executive Assistant

Attachment H

Affidavit

VERA GLASER, being first duly sworn, deposes and says:

As a columnist for The Knight Newspapers, Inc., I interviewed Alexander P. Butterfield, Administrator of the Federal Aviation Agency, on October 26, 1973. In accordance with my regular practice and with the permission of Mr. Butterfield, I personally had the interview recorded by tape. Attached to this affidavit is a true and accurate copy of the portion of the typed transcript of the tape recording of the interview with Mr. Butterfield, which deals with Mr. A. E. Fitzgerald.

/s/ Vera Glaser
Vera Glaser

Subscribed and sworn to before me
this 1st day of July, 1974.

/s/ Bonita K. Bowman
Notary Public

My Commission Expires: 30 April 1978

Excerpt from taped interview with FAA Administrator Alexander Butterfield October 26, 1973

Q—Were you involved at all in the Fitzgerald matter? A—No.

Q—Was it you who said that "loyalty is the name of the game?" A—Yes, it was my memo. I would write that memo again. That's been taken out of context. I had no policy role at the White House. I attended a meeting which as on a number of different subjects. One of the many subjects was the Fitzgerald issue.

This was a high level meeting at the White House in Haldeman's office and one of the subjects was Fitzgerald. From what I heard about what Fitzgerald did, from the story that was given to us in that meeting about the course of action he took and how he circumvented channels, I went back to my office and said, "no way should we allow him to .... If it's up to us, and the subject was being discussed as to what course of action to take from the White House with regard to Fitzgerald, that it's my humble opinion Haldeman, for what you want to do with it, and I wasn't the kind of fellow that would normally advise Haldeman on anything—it wasn't my role at all. My role was almost purely administrative. I dealt only with the President. I worked quite independently from Bob Haldeman, as a matter of fact, in my day-to-day tasks. For what it's worth to you, from what I know, from that meeting, he should not be allowed back on the federal payroll. He's done something that's unpardonable in any organization.

Q—You mean not going through channels?

B. Yes. I mean he should ... now maybe he did, but it was my understanding that he didnt. I dont know, See that's why I'm not qualified to say anything about the Fitzgerald case. My memo was just from Alex Butterfield to Bob Hald sort of two people, not in any official way at all. I don't know how any one I said and then let him bleed ... I didnt mean I wanted his gums to bleed or his lips or his arm or his navel .. You know, that is so ridiculous—twist in the wind and let em bleed. Colson walking over his grandmother—all those things. And I

was there when Colson said that. That was just a fight talk. Colson said, "let's get in there, man. Let's get off our asses and do something. Why I'd walk over . . . He wouldnt walk over his grandmother. Ehrlichman was talking about a friend of his about twist. I bet George Allen's saying about the same thing, even worse, every Saturday. Let him bitch a little bit. Let him cry. And I said, he may be a top-notch analyst or whatever he is and at least for a while, let's let him bitch, because I dont think the government's wrong here, and if we put him back on the payroll, we're admitting that the government is wrong. The government was entirely right. Now it could be that I do not know the facts. I'd be the first to admit that I dont know the true facts. I've never met him. I give him all the credit in the world for being a savvy fellow. But if he did what I was told in that meeting immediately before I wrote that memo, then I'm not sorry for what I said, but it was such a little dinky inter-office memo. It was not to have any force. And when that memo came out, I was surprised because I'm not privy to that memo. That's the President's property.

How did some one get that memo? And then of course they ballyhooed it, and they made me look like some sort of a bloodthirsty guy. I wrote one other memo, similar to that, out of my field entirely, Haldeman should have said, this is none of your business. Butterfield—which he probably did—but after the Sontay raid, the President was contemplating making that Colonel who led that raid a general. Well, I spent a long time in the military. You dont make generals for that. I mean, there's a very, very complex, intricate fine system for promoting officers to general officer. An awful lot of things are taken into consideration. When a guy does something like lead a raid like that, that took a lot of courage. That's why they have awards and decorations in the military. And you give him the highest one in the land (who was the Sontay man?) I forget his name. I really do. Colonel something. The President was just considering.

So I wrote a little memo to the President. I just wanted to remind him that the military, when its time for him to be promoted, and it may be that the military should decide that, because so many other things are considered. His ability to

command. His presence, and all of these kinds of things. and a medal, fine. You can give him the Congressional medal if you want. The medal of honor, the distinguished service cross—which I think he got, (The President took your advice on that?) Well, I dont know if he did or not. The fellow wasnt promoted to general.

But those are the only two cases I can think of in which I acted sort of out of my role just for whatever he wanted . . .

Q—I appreciate your telling me about the Fitzgerald case because . . . . A—Well, my old Friend Clark Mollenhoff, who was my friend, has taken . . yes, he did in this because I guess he's Fitzgerald's benefactor in some way. He's written some terrible things about me as a result of that.

Q—But you still think Fitzgerald should not be on the government payroll? A—Well, I'd hate for you to quote me. I dont even know the Fitzgerald case. But as it was outlined in thatmeeting, I thought he did, but if some FAA fellow just took it upon himself to decide, he is deciding that I am doing something wrong and goes to the Congress with it, I think that fellow ought to be fired, because he can go to Secy. Brinegar. He can come to me. He can go to Brinegar. Maybe Fitzgerald went to a few people, but I think he ought to go to the Secy of the Air Force's home and camp there if he has to before going to Congress. To me, thats a little bit . . .

Q—And the Congress? A—They love it. And if he's going to do that. I think he should call the Air Force down if they're wasting money. He definitely should have seen some one. But there's so many people to see before you go to the Congress. That's all I'm saying. And that's why I wrote loyalty is the main thing.

Attachment I

[810] LTCOL. TEAGARDEN: And he does so decline, sir.

MR. BODNER: I would like to get it from the witness.

BY MR. BODNER:

Q—Let me ask you this question, Mr. Secretary. Did you or anyone, to your knowledge, contact anyone on the White House staff or in the White House or elsewhere in the Federal Government, suggesting that there might be an error in the President's statement? A—I decline comment.

Q—Would you state the reason why you decline, sir? A—Executive privilege—excuse me, I meant to say I consider it a privileged communication.

As Colonel Teagarden has said, it is somewhat moot whether the term Executive privilege applies in this case.

Q—Would you tell us the basis on which you refuse to answer? A—That I consider that comment about any discussions, communications with the White House, between the White House and the Air Force to be a privileged matter.

Q—Have you received the approval of the White House or the President to invoke privilege in response to that question? A—I consider that a privileged matter.

Q—Do you know, sir, that before you can invoke Executive privilege to cover communications with the White House,

* * *

[853] right? A—Yes.

Q—You are also claiming it with respect to the exercise of Executive privilege by you last week, isn't that right, any communications you had with the White House with respect to that? A—Yes.

*

Q—And you are also claiming it with respect to any communications with the White House or the President with respect to the statement made by the President and the statement made by Ron Ziegler; is that right? A—Yes.

Q—Now, there is one other area which I would like to ask you about. Are you claiming Executive privilege with respect to communications with the White House after the decision was made to terminate Mr. Fitzgerald, but for the purpose of explaining to the White House the basis of that decision? A—Yes.

Q—Are you aware, sir, or do you have any knowledge that after the decision was made to terminate Mr. Fitzgerald on November 4, 1969, Mr. Schedler, along with Colonel Pewitt, was called to the White House to give an explanation for Mr. Fitzgerald's termination? A—I am not aware of that.

Attachments 3 through 6
to
Motion to Dismiss or, in the Alternative, for Summary Judgment (filed November 21, 1978)

UNITED STATES DISTRICT COURT

Southern District of California

Civil No. 75-4-T

PETER BOHMER; PAULA THARP,

Plaintiffs,

v.

RICHARD MILHOUS NIXON, et al.,

Defendants.

Opinion and Order

[Filed June 17, 1976]

Plaintiffs Peter Bohmer, formerly a professor at San Diego State University, and Paula Tharp, formerly a staff member of the San Diego Street Journal, brought this lawsuit in January 1975. Plaintiffs are self-styled critics of the American form of government, and of the Nixon Administration.

Plaintiffs allege a broad, nationwide conspiracy among present and former federal and local officials, and members of a right-wing paramilitary group known as the Secret Army Organization. Federal officials, who include then President Nixon, are said to have implemented, approved, or condoned various plans and programs, the purpose and effect of which were to suppress dissident activities of such groups as the "New Left" or of persons sharing the views of the plaintiffs. Examples of these programs include: "Cointel," the "Huston Plan" the "White House Enemies List," the "Liddy Plan," and so forth. Generally, the acts alleged in furtherance of the conspiracy or conspiracies are local in nature, and encompass the conduct of the F.B.I. the C.I.A., their informants, and numerous

agents of the San Diego County Sheriff's Office and the San Diego City Police Department, among others. The acts themselves include: a shooting, telephonic threats, vandalism, firebombings, warrantless searches, and a bad faith criminal prosecution which resulted in a felony conviction.

Plaintiffs allege the conspiracy or conspiracies and the overt acts constitute infringements of their civil rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments, as well as under the Civil Rights Acts [42 U.S.C. §§ 1983, 1985, 1986] and the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. §§ 2510-2520]. As redress for these alleged wrongs plaintiffs seek an injunction, a declaratory judgment, and money damages of 5.3 million dollars. From former President Nixon, plaintiffs seek the same relief, although at oral argument they recognized the mootness problems, and therefore concentrated on the money damage aspect of the case against him. This Court proceeds on the assumption money damages is the primary form of relief sought.

Mr. Nixon, through private and government counsel, in separate motions, moves to dismiss the claims against him on the ground that the discretionary acts of a Chief Executive present non-justiciable questions over which this Court has no jurisdiction to review. Rather than the traditional grounds of justiciability, Mr. Nixon really urges the contention that he is immune from suit for acts done while President.

I.

To the extent that it is contended, this Court must reject the argument that a President is absolutely immune from judicial relief, whatever the form of that relief, and whatever a President's conduct. *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974); *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir. 1973); *cf. United States v. Nixon,* 418 U.S. 683 (1974).

II.

What remains is an argument grounded in concepts of separation of powers to the effect that this Court should not retain jurisdiction over the action against Mr. Nixon under the circumstances presented in this case. The contention is premised on the notion that the judiciary should limit the circumstances in which it will afford judicial relief to a plaintiff in an action against the President. The purpose of judicial self-restraint is to avoid needless constitutional adjudications and direct confrontations between the judicial and executive branches of government.

There are certain plausible policy justifications to support what amounts to a distinction in treatment between a President and any other executive officer. Courts recognize the interests of the nation are generally best served if a President is not required to divert precious time to the defense of his every judgment or decision in a court of law. More importantly, it is desirable to foster a President's independence of thought and judgment, rather than to routinely subject his decisions to judicial scrutiny. *See generally Nixon v. Sirica, supra,* at 750-752 (MacKinnon, J., concurring and dissenting opinion). Implicit in these considerations is the practical recognition that the Chief Executive acts through his agents, and in many circumstances, delegates almost completely the performance of certain duties.

Generally, courts have recognized that the judiciary may give mandamus relief where the executive function is ministerial or perfunctory in the sense that a specific action is commanded by a statute or by the Constitution. *Mississippi v. Johnson,* 71 U.S. (4 Wall) 475 (1867); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Yet no case has been cited or found in which this relief was actually given against a President. These same cases acknowledge that judgmental or discretionary acts of a President are not reviewable by the judiciary.

Recent Presidential cases have mollified the absoluteness of the latter proposition, recognizing that in certain, limited circumstances the judicial branch must determine directly, the

legality of acts of a Chief Executive. *See, e.g., National Treasury Employees Union v. Nixon, supra; Nixon v. Sirica, supra.* In the *National Treasury* case, the Court of Appeals found that the Federal Pay Comparability Act, 5 U.S.C. § 5301 et seq., required the President to perform a ministerial act, the actual performance of which had not been delegated. Because the requirement to act was deemed ministerial, mandamus was held to be the proper remedy. President Nixon contended he was immune from the lawsuit under the separation of powers doctrine, as he contends here. But the court rejected the contention, concluding that the President was a necessary or indispensable party to the action in the sense that without his presence plaintiffs would be without remedy. Similarly, in *Nixon v. Sirica, supra,* the Court of Appeals affirmed the district court's denial of President Nixon's motion to quash a Grand Jury subpoena for the White House tapes. The court found that since the tapes were in the personal possession of the President, no other party could comply with the subpoena. Both courts expressed reluctance to directly confront or interfere with the Chief Executive, but neither was willing to exalt the generalized policies supporting judicial non-interference in the particular circumstances where a judicial remedy would be denied altogether or where the Grand Jury process would be thwarted.

However, where the same quality of necessity has not been demonstrated, other courts have declined to retain jurisdiction over a President. *See, e.g., Reese v. Nixon,* 347 F.Supp. 314 (C.D. Cal. 1972) rvsd. in part on other grounds No. 72-3070 (9th Cir. May 9, 1974); *Atlee v. Nixon,* 336 F.Supp. 790 (E.D. Penn. 1972); *San Francisco Redevelopment Agency v. Nixon,* 329 F.Supp. 672 (N.D. Cal. 1971); *Suskin v. Nixon,* 304 F.Supp. 71 (N.D. Ill. 1969).

Here, plaintiffs have alleged a conspiracy or a series of conspiracies, in which there are fifty-six other co-conspirators named as defendants, and more are said to exist. Plaintiffs seek compensation for what they characterize as the wrongs done to them by Mr. Nixon while President, but this compensation—judicial relief—can be afforded from any of the other named executive officials who are later found liable. Plaintiffs are entitled to the opportunity to obtain judicial relief,

and this will not be precluded. They are not, however, entitled to monetary relief from a former or a sitting President absent a clear showing of his indispensability to the lawsuit. Moreover, the correctness of Mr. Nixon's judgments as President may be evaluated as a by-product of determining the legal rights of the remaining defendants, as has taken place in other cases. *See, e.g., United States v. United States District Court,* 407 U.S. 297 (1972); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952); *Zweibon v. Mitchell,* 516 F.2d 594 (D.C. Cir.1975). Finally, this Court deems unpersuasive plaintiff's argument that the policies supporting judicial non-interference with Presidential decisions do not apply in a lawsuit against a former President, as here. If in the first instance one accepts the salutary principles of not giving judicial relief against a sitting President unless some clear showing of necessity is made—which this Court does—then it necessarily follows that plaintiffs should not be allowed to do indirectly what they could not have done directly, where no showing of necessity has been made. This lawsuit could not have been maintained against Mr. Nixon as an incumbent President; thus, no greater right to bring this lawsuit should now accrue to plaintiffs.

III.

For the foregoing reasons, the claims against Mr. Nixon must be dismissed, with prejudice. This Court finds that the ultimate termination of the litigation will not be advanced by the granting of an interlocutory appeal from this ruling; therefore, plaintiffs' request for this relief must be denied.

IT IS SO ORDERED.

DATED: June 16, 1976.

/s/ Howard B. Turrentine
Howard B. Turrentine,
United States District Judge

UNITED STATES DISTRICT COURT

Central District of California

Civil No. 73-2442-MML

JANE FONDA,

Plaintiff,

v.

RICHARD M. NIXON,
President of the United States; et al.,

Defendants.

Opinion Regarding Service of Process upon the President of the United States

[Filed May 23, 1974]

Jane Fonda, the well-known actress and critic of United States activity in Southeast Asia, began this suit in October 1973 to obtain remedies for the alleged infringements of her civil rights by government officers. Unlike many civil rights cases, brought against local government officials or minor federal officers, this one seeks redress against present or former high-level federal law-enforcement officers, members of the Cabinet, advisers to the President, and the President of the United States.

Fonda contends that the defendants conspired among themselves to deprive her of her civil rights. The complaint does not exhaustively delineate the conspiracy, but the plaintiff has furnished some details about her claim. According to Fonda, Presidential advisers drafted the Huston Plan, which the President approved, to encourage government action against political dissidents.[1] The Huston Plan is described in some White House documents, first revealed publicly during the Watergate investigations.[2] As outlined in these documents, the plan includes an increase in electronic surveillance of persons in the United States that posed a threat to internal security, relaxation of restrictions on legal mail coverage and on

covert mail coverage, removal of barriers to surreptitious entry of facilities occupied by persons, an increase in coverage of campus activity, and other measures. Some portions—specifically the surreptitious entry and covert mail coverage—were recognized as illegal. The Huston Plan is not the only action taken at the White House by which Fonda claims to have been affected. Fonda's name allegedly appeared in an "enemies list" at the White House, and memoranda concerning her were allegedly present in White House files. By these steps and perhaps by other maneuvers, Fonda claims, the officials at the White House either commanded the specific wrongs done to her or directed activity that established a pattern or practice of anti-dissident measures leading to these wrongs, or tolerated the custom of taking those measures against dissidents.[3]

The specific events described as wrongs done to her include seizures of her personal papers, opening of her mail; electronic surveillance of her telephone calls, procurement of information from her bank records and placement of false telephone calls to her to investigate her family's activities. These occurrences allegedly interfered with her exercise or her civil rights and civil liberties.

As relief she seeks compensatory damages, punitive damages from each defendant, an injunction, a declaratory judgment, and a writ of mandamus. The demand for damages forms a major part of the action; and the demand is for a considerable sum, a total of several million dollars.

From Richard M. Nixon, President of the United States, she demands relief of every kind, including damages. On President Nixon's behalf the government has moved for an order quashing the service of process upon him. Added to the motion is a request denominated as "suggestion for dismissal of this action as to the President of the United States," in which the government contends that this Court should dismiss the action on the Court's own motion.

The government contends that a United States court, organized pursuant to Article III of the Constitution, has no jurisdiction to entertain an action against the President. The government views him as immune from the judicial process

itself, not merely possessed of defenses on the merits against the action to be instituted, except in limited and narrowly defined circumstances. In support of the claim to immunity, the government cites the doctrine of separation of powers. The government also argues that subjection of the President to the legal process in suits for damages, injunctive relief, or declaratory relief would influence his administration of office and restrict his independence, in derogation of the Framers' design that there should be no infringement on his will and resolution. Such suits would not only dampen his ardor, but would also consume his personal time, the government fears, and with some justification. Consequently it urges not merely a dismissal on the ground that no relief can be obtained, but dismissal on the broader ground that no action can even be instituted.

By discussing the separation of powers, the government invokes the principle, included in the political question doctrine, that some matters are committed exclusively to branches of the government other than the judiciary. The government's argument resolves itself into the alternative contentions that a suit against the President necessarily concerns the use of power committed to that office or that the suit necessarily concerns the exercise of discretion belonging to that office.

Although a few cases do suggest that the judicial power does not extend to cases involving the President's power, those cases must be read carefully. In the early case of *Kendall v. United States*, 37 U.S. (12 Peters 524, 610 (1838), the court did proclaim:

> The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.

This discussion of Presidential power was not entirely necessary, since the President was not a party and the case did not concern Presidential conduct.[4] Nor should the quoted language be read as a statement that persons exercising powers granted by the Constitution are exempt from the legal process of the judiciary. The official whose action was the subject of the suit,

the Postmaster-General, tried to shroud himself with Presidential prerogatives by claiming that only the President could exert direction and control over him, so that the judiciary could not order him to take action. The court flatly rejected that contention:

> It would be vesting in the president a dispensing power, which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the president with a power entirely to control the legislation of congress and paralyze the administration of justice.

Id., 611. In so ruling, the court was implicitly declaring itself empowered to take jurisdiction and decide whether a particular function was one within the exclusive domain of the executive. The court's statement quoted earlier in the paragraph should be read in context to mean that the courts, taking jurisdiction, will decline to issue remedies interfering with certain executive powers, not that the court's process fails to reach the executive branch.

A good example of the political question doctrine, involving the exercise of Presidential power, is *Hobson v. Tobriner,* 255 F. Supp 296 (D.D.C. 1966), cited by the government. There the plaintiff filed a civil rights action to enjoin the appointment of commissioners for the government of the District of Columbia and to order elections instead. The court said that the relief demanded would invade the political power of Congress and the duty of the President. This decision reflects a judgment about the nature of the power committed to the President and the impropriety of relief, not merely a recognition that the President was involved. It does not reflect that belief that the mere presence of the President paralyzes the Courts. Like *Kendall,* it treats the separation of powers concept as a factor going to the judicial remedies rather than the availability of the judicial process.

Closely related to the argument that a power is reserved to the President is the contention that in certain matters he has a discretion reserved to him. This is reflected in the traditional

doctrine that the judiciary can control ministerial functions, but not discretionary ones, by mandamus or similar remedies. The use of Presidential discretion was the subject in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), another case cited by the government. The State of Mississippi sued to enjoin the President from executing the Reconstruction Acts, on the theory that they were unconstitutional. In reply the Attorney General argued explicitly that the suit was defective because the President could not be served with process. The court held that the President could not be enjoined, even if he could be sued, because that suit would interfere with his discretion in enforcing the law. Analogizing a suit to enjoin action to a suit for mandamus to compel action,[5] the court ruled that injunctive relief would not be issued to restrain the exercise of discretion just as a mandamus would not be issued to compel performance of a discretionary duty. The court never reached the question about service of process. Like cases about discretionary duty, *Mississippi v. Johnson* turned on the nature of the duty, not the fact that the President had that duty,[6] and it concerned relief rather than the service of process.

Landmark cases like *Kendall* and *Mississippi v. Johnson*, often cite in support of Presidential immunity, were really cases about remedies or subject matter only. The courts ruled only after consideration of the subject matter, the nature of the power and its exercise, not merely the identity of the defendant. The presence of a political question or other suggestions of a problem stemming from the separation of powers are matters going to the court's jurisdiction over the subject matter or the remedies, not one going to its power to serve process upon the President. This distinction was made in the recent cases of *National Treasury Employees Union v. Nixon*, No. 72-1929 (D.C.Cir. Jan 25, 1974, and *Nixon v. Sirica*, 487 F. 2d 700, 712 (D.C.Cir. 1973). It is implicit in *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1976).

The courts rather than the President will examine the power and decide whether the case involves political questions or unreviewable discretion. Even when a matter arguably is committed to another branch by the express language of the Constitution, the courts will inspect the subject matter to decide

whether it fits the terms of the commitment. See *Powell v. McCormack*, 395 U.S. 486 (1969).

These statements imply the rejection of any notion that the nature of a political question has anything to do with the service of process. The judiciary will use its process against an official. If he prevails because there is a political question or unreviewable discretion, his victory is due to the nature of the subject matter, not to his identity as an official. If the court finds neither a political question nor unreviewable discretion to bar jurisdiction, the court can act against the President. *National Treasury Employees Union v. Nixon, supra; see United States v. Burr*, 25 Fed. Cases 30 (No. 14, 692d) (C.C.D.Va. 1807). Certainly after the court decisions in *National Treasury Employees Union v. Nixon* and *Nixon v. Sirica*, the courts will exert the judicial process against the President and leave the argument about the separation of powers to the determination of subject matter jurisdiction or the propriety of relief.[7]

If court action always interfered with the President's performance of duties, making the President less zealous in his work and less effective in carrying out his *proper* Constitutional functions, that might be good reason to limit his exposure to suits. But interference with Presidential action is not always so deleterious. Some interference of one branch with another is a part of the system of checks and balances by which each branch restrains the others. As Justice Brandeis observed:

> The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 203 (1927) (dissenting opinion). Action not in accordance with the Constitution or the statutes is not merely action beyond the declared limits of authority; as the District of Columbia Circuit said:

> ...[T]here is serious questions whether presidential actions inconsistent with congressional mandates constitute effective Government.

National Treasury Employees Union v. Nixon, supra, 46. The interference may benefit the nation in the long run, and the Constitution looks to the long run.

A similar analysis applies to the contention that judicial action interferes with a President's electoral mandate. An electoral mandate may prescribe the policies to be followed in formulating regulations and implementing law or in recommending to Congress some changes in the law, but it provides no authority to brush aside the law and it especially provides none to brush aside Constitutional rights. The electoral mandate does not define the office or its powers, but merely instructs the occupant on how to perform the duties of office.[8] The occupant must work within the framework of the office. Judicial action restraining him to the confines of the office does not interfere with the genuine electoral mandate. A certain amount of interference with the President's activity may conceivably be desirable.

A corollary to that is the proposition, which the Court recognizes, that some lawsuits seek not to restrain actions which are in fact illegal, but to affect action that is in fact within the President's authority. If a court should render preliminary relief, such as a temporary restraining order or injunction, that would effectively stop the President from carrying out duties. The fear of a successful suit for damages would have a chilling effect on the President's vigorous performance of his functions. The potential effect on the President's action calls for safeguards against the institution of suits which would affect him in his proper role. For that purpose the courts have developed devices such as the defense of official action. E.g., *Bivens v. Six Unknown Named Agents,* 456 F. 2d 1339 (2d Cir. 1972); *Gregoire v. Biddle,* 177 F. 2d 579 (2d Cir. 1949), *cert. den.,* 339 U.S. 949 (1950). The defense is not stated identically for each officer, and the range of activity swept within it varies considerably for each officer. But the scope of the immunity is measured by the official's function, not by his identity. In *Barr v. Matteo* 360 U.S. 564, 573-4 (1959), the court said in this regard:

> It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrasted—the relation of the act complained of to "matters committed by law to his control or supervision," *Spalding v. Vilas, supra,* [161 U.S.] at 498,—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

The defense does not entirely insulate an officer from a lawsuit, but only protects him from certain ones. The judiciary decides whether he has its protection in a particular case. In making the decision, the judiciary starts from the premise that the official is exposed to the judicial process. Within the legal process he has a shield against the plaintiff's complaint, but he does not have a shield against the legal process itself.

The legal process does require the time and attention of litigants. If numerous suits were brought against a President, and especially if they were suits for money damages, the President might find his personal time consumed by conferences with counsel, by furnishing information in discovery, and by similar matters. More than any other official, the President has to have the maximum use of his working time. For this reason the courts have protected the President's time by preventing suits from going forward if the litigant has adequate recourse by suits against other officials. But like the defense of official immunity, this doctrine is not armor against the legal process but merely a part of the legal process to be applied. The distinction between a defense within the legal process and a defense to the process stands forth in Chief Justice Marshall's opinion as a Circuit Judge in *United States v. Burr,* 25 Fed. Cases 30 (No. 14, 692d) (C.C.D. Va. 1807). On trial for treason, Burr sought a subpoena duces tecum to compel the President to produce a letter written by General Wilkerson to the President, Thomas Jefferson. The court considered the relation of the subpoena to the use of the President's time and rejected consumption of time as a defense to the simple issuance of a subpoena:

> If, upon any principle, the president could be construed to stand exempt from the general provisions of the

> constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued. . . . The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued.

The subpoena was issued, and Jefferson did provide the letter. The court recognizes the President's needs and interests by preventing disclosure of much of the letter in open court. Marshall required him to trust the judicial machinery, not to ignore it.[9] His decision refutes the government's theory that consumption of the President's time is a ground for immunizing him totally from the judicial process itself.

The President is not sovereign; the nation is. Through the Constitution the nation did not give sovereign power to the President. Nor does his political mandate constitute a grant of sovereign power. *Nixon v. Sirica, supra; United States v. Burr, supra.* The tenets of a republican form of government include surely the principles that officers are distinct from their offices and that officers are subject to the law. As Justice Jackson remarked, "With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . ." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 655 (1952) (concurring opinion), quoted in *Nixon v. Sirica, supra.* He is not above the command of the law, and no express guarantee in the Constitution exempts him from the conventional legal process. In *National Treasury Employees Union v. Nixon, supra,* and in *Nixon v. Sirica, supra,* the courts declared him subject to that process.

But as the Court has noted, the judiciary has developed techniques for the President to avoid the harassment of useless lawsuits. The concept of justiciability restricts their subject

matter; the defense of official action protects officers acting within their authority. In addition, because the President's time is uniquely precious, the courts have been reluctant to permit a suit against him if a suit can be brought against another official instead. In the recent cases holding him subject to legal process and rendering decisions against him, the courts have observed that the President was in fact indispensable. In *Nixon v. Sirica* the President had interposed himself by taking personal control over the property sought in a subpoena. The court could give no relief except relief against the President. In *National Treasury Employees Union v. Nixon,* the petitioner sought mandamus to compel performance of a duty imposed on the President and not delegated by him to any subordinate; again the only possible relief was relief against the President.[10] But in both cases the courts adverted to the policy against unnecessary suits. In *Nixon v. Sirica, supra,* 709, the court said:

> As a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President. Here, unfortunately, the court's order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by the subpoena.

The District of Columbia Circuit underscored its distaste for unnecessary suits when it stated:

> There is also little doubt that if it were possible for NTEU to enforce its rights by naming a defendant additional to or in substitution of the President, this Court would exercise its discretion not to answer the question of whether the President is subject to mandamus by a federal court to perform a purely ministerial duty.

National Treasury Employees Union v. Nixon, supra, 35. Litigants have succeeded in keeping the President in a lawsuit only when no alternative slate of defendants was available.

But in this action, a raft of defendants are present. The caption names twenty defendants besides Nixon, including two banks and a host of government officers. Since the activity that allegedly harmed Fonda necessarily involved persons besides

for such a case to be known by the name of a party no longer in it. The Court therefore strikes the name of Richard M. Nixon, President of the United States, from the caption. The case shall hereafter be designated "Fonda v. Gray, et al," the name of L. Patrick Gray being the one listed next in the caption.

In the event of a decision adverse to her, Fonda has requested a certification for an immediate appeal under 28 U.S.C. § 1292(b). The Court grants that request.

Dated May 23, 1974

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District Judge

Footnotes

[1] The specific details appear in an affidavit filed by Leonard I. Weinglass, one of Fonda's attorneys, in opposition to a motion by Huston for dismissal. An unsigned copy was filed on March 4, 1974; the signed copy, with corrections, was filed on March 5, 1974.

[2] Copies are attached to the Weinglass affidavit.

[3] See ¶ 42 of the complaint.

[4] The official involved, the Postmaster General, did not have only Constitutional functions. The court held that he had statutory powers as well. The statutory powers were certainly subject to control through mandamus, the remedy sought in the case.

[5] The analogy is now rather doubtful. Injunctions can be used to restrain officials from executing a law when that law is unconstitutional. E.g., *Ex Parte Young*, 209 U.S. 123 (1908). The courts do not accept the theory that an officer has discretion to decide whether a law is valid. The courts decide it for him.

[6] The power of the President is not made discretionary simply because the President possesses it. *National Treasury Employees Union v. Nixon, infra.*

[7] For the proposition that the President enjoys a total exemption from the jurisdiction of the courts, the government cites, in addition to *Hobson v. Tobriner* and *Mississippi v. Johnson*, the recent cases of *Davis v. Nixon*, No. 73-1520-LTL(G) (C.D.Cal., Nov. 29, 1973) (Lydick, J.); *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971); *Reese v. Nixon*, 347 F. Supp. 314 (C.D. Cal. 1972) (Hauk, J.), *aff'd on other grounds as to the dismissal of the*

action against the President, No. 72-3070 (9th Cir. May 3, 1974) (unpublished opinion); and *Suskin v. Nixon*, 304 F. Supp. 71 (N.D. Ill. 1969). The judge in *Davis* wrote no opinion, and so there is no written description of his reasons for dismissal. In *San Francisco Redevelopment Agency*, a suit for mandamus to compel the release of money, the court dismissed the action against the President and quashed service of process because no authority supported the proposition that a court could compel Presidential action. The District of Columbia Circuit has subsequently provided that authority in *National Treasury Employees Union v. Nixon, supra.* To the extent that *San Francisco Redevelopment Agency* relates the questions about propriety of compelling action to the validity of service of process, is undercut by the recent District of Columbia Circuit cases distinguishing between the power to consider certain subjects and the service of process on the President. In *Reese*, the District Court decided it had no jurisdiction over the President because of the separation of powers, and in *Suskin*, the court quashed service of process because the power involved—that of formulating standards under the draft law—was discretionary. The recent District of Columbia decisions, distinguishing between problems with the subject matter and the service of process, undercut these opinions. The Court follows the recent District of Columbia rulings.

[8] The government identifies the holder with the office. But the distinction between an office and its holder is a basic theme of the political history of the last several hundred years. The Court does not accept the government's view.

[9] To some extent, the language in *Burr* is undercut by the fact that a United States Attorney had conceded that a subpoena could be issued. The United States Attorney had denied only the propriety of issuing a subpoena duces tecum. The distinction between the two forms if flimsy, and Marshall noted that.

[10] The same was true in *Minnesota Chippewa Tribe v. Carlucci, supra.* Seeing no possible relief except relief against the President, Judge Green denied a defense motion to dismiss as to the President. However, the case has not proceeded to a decision on the merits, so far as the Court knows.

[11] Conceivably, the alleged wrongdoers would be within the scope of their authority for the purposes of 28 U.S.C. § 1946 outside of the exceptions enumerated in 28 U.S.C. § 2680. Section 2680(h) does exclude claims such as assault, battery, false arrest, and malicious prosecution, but the alleged actions do not clearly fall within

§ 2680(h). As the Senate Government Operations Committee recently concluded, "[U]nder the Federal Tort Claims Act, Government tort liability for intentional conduct is unclear. For example certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage." S. Report 93-588 (No. 29, 1973). This report is part of the legislative history behind P.L. 93-253, 88 Stat. 50 (March 16, 1974), which adds this language to § 2680(h):

> *Provided*, that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

This enactment was intended not merely to repeal the exception for most cases of the torts specifically listed in § 2680(h), but also to clarify the status of torts not listed, such as invasion of privacy. "Obviously, it is the intent of the Committee that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Tort Claims Act, if the amendment is adopted." S. Report 93-588. Although the new proviso applies by its own force only to cases arising after March 16, 1974, it may be a guide in interpreting the prior law about the non-listed torts. It is possible that the Government bears liability for the conduct behind Fonda's claims. The Court expresses no opinion on the matter.

[12] The Court renders no opinion on whether the plaintiff could sue Nixon after he leaves office nor on the running or tolling of the statute of limitations. These questions are not before this Court. Nor does the Court express any opinion on whether President Nixon would be protected by the defense of official action.

UNITED STATES DISTRICT COURT

Central District of California

Civil No. 73-1520-LTL(G)

ELMER DAVIS,

Plaintiff,

v.

RICHARD M. NIXON,
President of the United States of America, et al.,

Defendants.

Order Dismissing Complaint as to Certain Defendants

Pursuant to Title 28 U.S.C. § 636(b)(3), attached is the Report and Recommendation of the United States Magistrate who has reviewed the complaint and amended complaint filed herein for relief under the Civil Rights Act, together with the motion to dismiss as to various defendants, and the plaintiff's opposition thereto.

The Court has reviewed the foregoing and the objections to the Report and Recommendation of Magistrate Ralph J. Geffen and concurs with and adopts the findings and conclusions of the Report and Recommendation.

IT IS ORDERED that the motion to dismiss the amended complaint is granted as to Defendant Richard M. Nixon, President of the United States of America, and that the motion to quash the service of summons on said defendant, and to strike his name from all pleadings is denied, without prejudice to renewal at a later date.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order by United States mail, upon the plaintiff, upon La Follette, Johnson, Morgan & Robinson, counsel for defendants-Cork, Campbell and Franklin, and upon the United States Attorney, counsel for the remaining defendants.

DATED: June 18, 1974.

/s/ Lawrence T. Lydick
Lawrence T. Lydick
United States District Judge

UNITED STATES DISTRICT COURT

Central District of California

Civil No. 73-1520-LTL(G)

ELMER DAVIS

Plaintiff,

v.

RICHARD M. NIXON,
President of the United States of America, et al.,

Defendants.

Report and Recommendation as to Civil Rights Complaint

Plaintiff, a state prisoner, appearing *in forma pauperis* and without counsel, has brought this civil rights action for damages against (A) the President of the United States, Richard M. Nixon, (B) four of the presidential "advisors", "aides" and "consultants", John D. Ehrlichman, Egil (sic) Krough, E. Howard Hunt, and G. Gordon Liddy, and (C) three officials of the Beverly Hills Police Department, B. L. Cork, Bruce Campbell, and W. L. Franklin.

Jurisdiction is alleged under provisions of the civil rights acts, 42 U.S.C. §§ 1983, 1985 and 1986 [*Haines v. Kerner,* 404 U.S. 519 (1972);] via 28 U.S.C. §§ 1331 and 1343(3) and (4), and may also be present under the Fourth and Fifth Amendments [cf. *Bivens v. 6 Unknown Named Agents,* 403 U.S. 388 (1971) via 28 U.S.C. § 1331(a).

An order was made by the United States Marshal for service of the original complaint upon the defendants without prepayment of fees. However, service has not been accomplished as to any of them except the last-named group, and in the case of defendant Nixon the United States Marshal for the District of Columbia declined to make service on the grounds that he had "no authority to serve the President", and that "the President of the United States is not amenable to service of process and is not subject to any court for the exercise of his powers whether constitutional or statutory, political or otherwise."

An amended complaint was subsequently filed. No order for service thereof has been made, and it has not been served on any of the defendants excepting defendants Cork, Campbell and Franklin, who have filed an answer thereto.

On September 24, 1973, a Notice of Motion was filed by the United States Attorney on behalf of defendant Nixon

(1) seeking that service of summons directed to defendant Nixon be quashed, and

(2) suggesting that the action be dismissed as to defendant Nixon.

An amended Notice of Motion to the same effect was filed by the United States Attorney on behalf of defendant Nixon on October 17, 1973. Although this preceded the filing of the amended complaint, an order was made by the Magistrate on November 17, 1973 that this motion remain on calendar. Hearing was had thereon on November 26, 1973. Plaintiff did not appear and was not represented, but did file opposition to the motion, presenting a well-drawn memorandum of points and authorities in support of his position.

The scope of the hearing was confined to an explanation by the United States Attorney of the legal grounds relied upon for his motion. They included the following points:

(1) A federal officer is not liable to suit under 42 U.S.C. §§ 1983 or 1985;

(2) The President is immune from civil suit for acts within the scope of his authority;

(3) There is no jurisdiction of the action because diversity of citizenship is not alleged.

Of these, (1) and (2) were specified in the notice of motion.

A great deal of research has been done as to the principle that the separation of powers doctrine militates against the assertion of jurisdiction by the judicial branch over the person of the head of the Executive Branch. This Court has stated that principle in *Reese v. Nixon*, 347 F.Supp. 314 (C.D. Cal. 1972),

affirmed and reversed, in parts, #72-3070, unpublished Memorandum, May 3, 1974. Accord, *San Francisco Redevelopment Agency v. President Richard M. Nixon*, 329 F.Supp 672 (N.D. Cal. 1971); *National Association of Internal Revenue Employees v. Nixon*, 349 F.Supp. 18 (D.D.C. 1972); *Trimble v. Johnston*, 173 F.Supp. 651 (D.D.C. 1959).

An analysis of the first cause of action of the amended complaint, which, as a *pro se* pleading, is to be liberally construed [*Haines v. Kerner*, 404 U.S. 519 (1972)], indicates that it charges only defendants Cork, Campbell and Franklin with any conduct. The conduct complained of is that these defendants, under color of state and federal law, invaded plaintiff's right of privacy by publicly making false statements that plaintiff had confessed to burglary of the offices of a Dr. Lewis J. Fielding (the "Ellsburg burglary"), with intent to cause his false arrest and imprisonment and involve him in such "scandal", in violation of his rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution; as a result, plaintiff alleges, he was humiliated and sustained mental pain and suffering. (Amend. Complt., p. 1-p. 5, l. 12.)

The second cause of action includes claims against *all* of the defendants. It designates defendant Nixon as the President of the United States, defendant John D. Ehrlichman as "Presidential Advisor", defendant Egil Krough (sic) as "Presidential Aide", and defendants E. Howard Hunt and G. Gordon Liddy as "Presidential Aides and Consultants"; the four last-named are described as "officials of the United States Government in an appointive capacity." (Amend. Complt., p. 5, 11, 15-19; p. 1, l. 1-p. 2, 11. 1-6, 16-31.) All of the defendants are alleged to have acted under the color of state and federal law. (Amend. Complt., p. 3, 11. 8-11.)

The second cause of action, imperfectly drawn, clearly intends to charge a conspiracy by all defendants, directed at plaintiff, to make plaintiff a "scapegoat" "to cover for themselves in their own criminal acts of conspiracy to commit" the so-called "Ellsburg burglary" by "falsely accusing the Plaintiff of having 'confessed' to said crime; the alleged intent was to

thereby bring about the conviction of Plaintiff for the alleged commission of said crimes and to cover for the Defendant-Government officials' involvement in said crimes, in direct violation of the Plaintiff's Constitutional Rights as guaranteed under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (Amend. Complt., p. 6, l. 11-p. 7, l. 5.)

In support of this broad claim, the second cause of action alleges that "Defendant Richard M. Nixon, the President of the United States of America, acting through and by his agents and representatives Defendant Egil Krogh, E. Howard Hunt, and G. Gordon Liddy, and others under the guise of domestic security "conspired to commit the 'Ellsburg burglary' ", and in pursuance thereof defendants Hunt and Liddy, utilizing equipment supplied by the Central Intelligence Agency, committed the burglary. (Amend. Complt. p. 5, l. 21-p. 6, l. 10.)

He further claims that at a later date he was subsequently arrested and prosecuted for an unrelated burglary by defendant Franklin "and others", that defendant Franklin attempted to get plaintiff to admit to that burglary "and other unspecified burglaries in the Beverly Hills area" which plaintiff denies committing; that defendant Franklin testified against him at the preliminary hearing in that case and his testimony was based largely upon "an unsigned and manufactured confession", resulting in plaintiff's being bound over for trial. As a further result of defendant Franklin's alleged perjury[66] and conspiring to commit those crimes in consort with the Defendant Bruce Campbell, and others . . . in furtherance of . . . the conspiracy to make the Plaintiff the 'scapegoat' for the (Ellsburg burglary) and to bring about his conviction on (the unrelated burglary), the Plaintiff was convicted of (the unrelated burglary)." (Amend. Complt. p. 7, l. p. 9, l. 6.)

Plaintiff alleges that as further overt acts in furtherance of "the herein complained of conspiracy" defendant Cork publicly accused plaintiff of confessing to the Ellsburg burglary a month after it occurred, stating that it allegedly occurred while plaintiff was looking for narcotics; and that David Nissen, "United

States Prosecuting Attorney" in *United States v. Russo,* Crim. No. 9373, "in the Pentagon-Papers Trial", introduced into evidence in that case certain evidence relating to plaintiff "while withholding other equally relevant evidence ... that would have proven that the Plaintiff had not committed the (Ellsburg burglary) ... with the intent to make it appear that the Plaintiff had actually committed the said criminal offense in order to obstruct justice and have the Plaintiff convicted of the said crime ... and/or in the alternative cast him in a bad light before the eyes of the public ...." (Amend. Complt., p.9, l. 7-p. 10, l. 14.)

It is alleged that as a further act in furtherance of the "conspiracy", "Defendant Richard M. Nixon, President of the United States of America", and "John Ehrlichman, Presidential Advisor/Defendant" invited the presiding judge at the "Pentagon-Papers" trial to the Western White House for the purpose of offering him "the bribe of a position with the Federal Bureau of Investigation as its Director" with the "malicious intent of influencing the outcome of the Pentagon Papers Trial" and "securing the conviction of Daniel Ellsburg and Anthony F. Russo" and "substantiating the Plaintiff's alleged involvement in the (Ellsburg burglary)." (Amend. Complt. p. 10, l. 16-p. 11, l. 4.)

Lastly it is charged that in furtherance of the alleged conspiracy defendants Cork, Campbell and Franklin falsely testified before the Los Angeles County Grand Jury in June 1973, regarding the "Ellsburg burglary", "in support of their statements and accusations previously made accusing the plaintiff of having confessed to the (Ellsburg burglary)." (Amend. Complt. p. 11, 11, 5-29.)

Plaintiff seeks substantial damages in this action, and demands a jury trial.

It is concluded that the amended complaint is, as to defendant Nixon, for conduct allegedly engaged in by him in his capacity as President of the United States, and that, at least as to this defendant, the amended complaint fails to state a

claim cognizable in a federal court. His entry into the conspiracy alleged was purportedly in the pursuit of "domestic security."

"It is not within the province of the courts to inquire into the policy underlying action taken by the political departments—Congress and the President—in the exercise of their conceded powers." The Constitution of the United States of America, Senate Doc. # 39, 88th Congress, 1st Session, p. 524.

The President is "beyond the reach of judicial direction in the exercise of any of his powers, whether constitutional or statutory, political or otherwise," op. cit., at 553-54, citing *State of Mississippi v. Johnson,* 71 U.S. 437 (4 Wall 475(1867) [in which an injunction against enforcement by the President of an Act of Congress was denied.]

See, however, *Scheuer v. Rhodes,* ____ U. S. ____, April 24, 1974, in which the Supreme Court said:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' *Sterling v. Constantin,* 287 U.S. 378, 397 (1932)."

In a recent unpublished opinion, the Ninth Circuit Court of Appeals said,

> "We do not reach the question whether the district court has power to assert jurisdiction over the President because we agree with the district court that no claim for relief has been or can be stated against the President under the doctrine of executive immunity explicated in *Barr v. Matteo* (1959) 360 U.S. 564 and *Scheuer v. Rhodes* (1974) ____ U.S. ____. (See also *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (2d Cir. 1972) 456 F.2d 1339.)" *Reese v. Nixon,* # 72-3070, Memorandum, May 3, 1974, affirming and reversing, in parts, 347 F. Supp. 314 (C.D. Cal. 1972).

On the other hand, by common law principles, a subordinate executive officer is personally liable under the ordinary law for any act done in excess of authority, op. cit., at 555, citing *Little v. Barreme*, 2 Cr. 170 (1804); *United States v. Lee*, 106 U.S. 196 (1882); *Spaulding v. Vilas*, 161 U.S. 483 (1896). The federal district court has jurisdiction to entertain such suits [*Bell v. Hood*, 327 U.S. 678 (1946)], and may now award damages for violations of constitutional rights, in appropriate cases [*Bivens*, supra], unless there is official immunity for the acts complained of. [Cf. *Reese v. Nixon*, 347 F.Supp. 314, 317-18 (C.D. Calif. 1972), affirmed in part and reversed in part, in an unpublished opinion (9th Cir. May 3, 1974).]

Dismissal of the complaint as to the President is therefore appropriate. Holding the President liable for damages for his past official conduct would be as much of an interference with the Executive Branch as would be the enjoining or mandating of future acts.

Granting of the motion to quash the service of process is inappropriate, since there has been no service made upon him. No good cause is shown for striking the name of defendant Nixon from the pleadings, and no authority or argument thereon has been put forward by the moving party. Since defendant Nixon's name is the first to appear, it would cause some confusion in court records to now strike that name from all pleadings. If this matter were to come to trial before a jury, good cause might then exist, and the motion could then be renewed.

IT IS THEREFORE RECOMMENDED that the motion to dismiss the complaint be granted as to defendant Richard M. Nixon, President of the United States of America, and that the motion to quash the service of summons on defendant Nixon and to strike his name from all pleadings be denied, without prejudice.

DATED: May 24, 1974

/s/ Ralph J. Geffen
Ralph J. Geffen

Do Not Publish

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

No. 72-3070

THOMAS REESE, et al.,

Plaintiffs,

vs.

RICHARD M. NIXON, et al.,

Defendants.

Memorandum

[May 3, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY, HUFSTEDLER and SNEED,
Circuit Judges

The district court erred in dismissing this civil rights action without leave to amend. Although the complaint's general allegations of conspiracy, purpose, intent, and color of authority are vague, conclusory, and rambling, they are adequate to withstand a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure. A civil rights action may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41. . . . " (*Cohen v. Norris* (9th Cir. en banc 1962) 300 F.2d 24, 31; *accord, Haines v. Kerner* (1972) 404 U.S. 519.) The complaint does fail to set forth the overt acts of the defendants in furtherance of the objects of the conspiracy. (*Hoffman v. Halden* (9th Cir. 1959) 268 F.2d 280, 295-96,

overruled on other grounds, Cohen v. Norris, supra.) However, to the extent that further particularity is needed, the defendants can move for a more definite statement under Rule 12(e), Federal Rules of Civil Procedure.

Even if the motion to dismiss had been properly granted, the district court abused its discretion in rejecting appellants' request to amend the complaint. (*See generally Foman v. Davis* (1962) 371 U.S. 178.)

The district court properly dismissed the fictitiously named defendants under Rule 4(j) of the Local Rules of the United States District Court, Central District.

We do not reach the question whether the district court has power to assert jurisdiction over the President because we agree with the district court that no claim for relief has been or can be stated against the President under the doctrine of executive immunity explicated in *Barr v. Matteo* (1959) 360 U.S. 564 and *Scheuer v. Rhodes* (1974) ____ U.S. ____ (*See also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (2d Cir. 1972) 456 F.2d 1339.)

The doctrine of executive immunity, however, is inadequate at this stage of the case to insulate the remaining federal and state officials named as defendants. Executive officials do not possess an absolute and comprehensive immunity as to all acts allegedly performed within the scope of their official duty. (*Scheuer v. Rhodes, supra,* at ____.) An official is immune only if he performs "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority" (*Barr v. Matteo, supra* at 575 (Harlan, J.)) and only when the act complained of is "within the outer perimeter of [his] line of duty" *(id.)*. A determination as to the applicability of executive immunity to the named defendants other than the President cannot be made in the absence of a factual record, because the extent of the qualified immunity to which the defendants are entitled depends upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It

is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." (*Scheuer v. Rhodes,* supra at ____.) The record is far too unclear presently to ascertain which official or officials acted within the range of discretion permitted the holders of particular offices and acted in good faith. The plaintiffs are entitled to be heard more fully than is possible on a motion to dismiss a complaint. (*See id.* at ____.)

The prosecutors are not immunized from suit unless the acts complained of took place as an integral part of judicial process. (*Donovan v. Reinbold* (9th Cir. 1970) 433 F.2d 738, 743-44; *Robichaud v. Ronan* (9th Cir. 1965) 351 F.2d 533, 536.) Until the record is more fully developed, it is not possible to determine whether immunity extends to the prosecutors named as defendants.

The record is also too poorly developed to sustain a conclusion that abstention is appropriate in respect of defendant Flournoy. The suggestion that defendant Flournoy is being sued for his role as state tax collector in the process of collecting taxes is no more than conjecture.

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with the views herein expressed.

Supreme Court, U.S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

No. 79-1738

RICHARD NIXON, Petitioner,

v.

A. ERNEST FITZGERALD, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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DATED:

May 6, 1980

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1738

RICHARD NIXON, Petitioner

v.

A. ERNEST FITZGERALD, Respondent

PETITION FOR A WRIT
OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction in the premises.

2. Whether a former President is absolutely immune from civil damages liability for intentionally violating a criminal statute and the constitutional

rights of a civil servant by ordering him fired on account of his truthful and authorized testimony to a congressional committee.

REASONS TO DENY THE WRIT

1. This Court Is Without Jurisdiction Because the Pretrial Order Below Was Not a Final Judgment.

This Court's jurisdiction on certiorari to the courts of appeals is limited to "cases in" those courts. 28 U.S.C. § 1254. See United States v. Nixon, 418 U.S. 683, 690 (1974). This case was not in the United States Court of Appeals for the District of Columbia Circuit at the time this petition was filed because that court had granted respondent's motion to dismiss for lack of jurisdiction. 1/

1/ The dismissal by the Court of Appeals created no "split in the circuits" (Pet. 14 n.3) on the issue of appealability before [footnote continued]

Petitioner argues that the dismissal by the Court of Appeals was erroneous because the District Court's order denying summary judgment was a final order appealable under 28 U.S.C. § 1291. (Pet. 13-14.) But in denying summary judgment, the District Court found that "[g]enuine issues of fact remain as to the scope of each defendant's responsibilities" (Pet. 3a), which defendants had the burden of proving as a predicate for the affirmative

[footnote continued]

trial of the immunity defense. One criterion for appealability before trial is that the appeal present "a serious and unsettled question." Community Broadcasting of Boston, Inc. v. FCC, 178 U.S. App. D.C. 256, 259, 246 F.2d 1022, 1025 (1976), quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547 (1949). In the cases cited by petitioner, the availability of the immunity defense did present "a serious and unsettled question" in the respective circuits at the time the appeals were noted. Here the question had been settled in this Circuit by Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), petition for cert. filed, No. 79-880 (Dec. 7, 1979).

defense of official immunity. See Butz v. Economou, 438 U.S. 478 (1978). Denial of summary judgment because of disputed issues of fact is not final for purposes of review. Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966).[2/] There is thus more to be done in the District Court. The factual disputes about what petitioner did and whether what he did was outside the scope of his responsibilities[3/] have still

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2/ Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), petition for cert. filed sub nom. Mitchell v. Forsyth, No. 79-1120 (Jan. 18, 1980), illustrates the reason for this principle. There is no indication in that opinion that the District Court's denial of summary judgment rested on disputed issues of fact, and it was therefore arguably appealable under the collateral order doctrine. Nevertheless, the Court of Appeals itself discovered that the facts were disputed and was obliged to remand for resolution of that dispute. Allowing the appeal in Forsyth thus resulted in precisely the inefficiency and delay which the finality requirement was intended to prevent.

3/ This is not a case involving the President's discretionary authority to

[footnote continued]

to be resolved.

Moreover, these disputes are not collateral to and separable from the principal issues on the merits. See Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546. They are the principal issues; they are disputes "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963).

Finally, automatic appealability of denials of summary judgment on absolute immunity grounds threatens an abuse

[footnote continued]

appoint or remove senior executive officers of the United States, but rather involves the removal of an inferior officer, see United States v. Perkins, 116 U.S. 483 (1886), on whose removal Congress has placed statutory restrictions. Fitzgerald v. Hampton, 152 U.S. App. D.C. 1, 8, 467 F.2d 755, 762 (1972) ("Fitzgerald's employment is under legislative protection") (emphasis in original).

of appellate process. Any government official sued for civil damages can plead the affirmative defense of absolute immunity and, on petitioner's theory, seek an immediate appeal as of right of any pretrial order denying that immunity. In the interests of orderly appellate process and economy, the collateral order exception to finality should be more strictly applied, as the Court of Appeals properly did in construing its own jurisdiction here.

2. Even If the Court Had Jurisdiction, There Is No Factual Record For Deciding a Complex Question Of Constitutional Law.

Petitioner is asking this Court to decide what he terms a constitutional question "of exceptional importance to the functioning of the Presidency" with "far-reaching ramifications." (Pet. 9.)

But there could hardly be a worse -- a more incomplete and at the same time disputed -- record for such a decision. The District Court denied summary judgment on the ground that all the material facts "regarding the conduct of all three defendants" are genuinely disputed. (Pet. 2a.) Thus, even if this Court had jurisdiction, it should deny the petition because the case still lacks "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." United States v. UAW, 352 U.S. 567, 591 (1957). Indeed, it is not an overstatement to say that virtually every material fact asserted in the petition is genuinely disputed.

A few examples will suffice.

a. Petitioner minimizes his challenged conduct as "the very kind of activities a President confronts daily," involv-

ing "a trivial matter -- indeed, an internal executive branch personnel dispute * * *." (Pet. 10.) The District Court reached precisely the opposite conclusion:

> [T]he Court has considered the unique demands placed on the time and energies of defendant Nixon as President. There is, however, ample evidence in the record that Fitzgerald's predicament was not simply one of a disgruntled civil servant. Both members of Congress and the press identified plaintiff's case as being of great public importance throughout 1969. Factual circumstances surrounding the termination were repeatedly raised for the President's attention. [Pet. 3a; citations omitted.]

b. Petitioner asserts that he is only being sued for passive conduct -- approving Fitzgerald's termination or failing to reinstate him. (Pet. 10-11.) Not so. He is charged with directing an intention, concerted and conspiratorial

effort to punish Fitzgerald for exercising his First Amendment rights; he is charged with ordering the firing. That claim is squarely grounded on petitioner's own admission in the record:

> I said get rid of that son of a bitch. You know, 'cause he is, he's been doin' this two or three times. So [Secretary of the Air Force] Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it. [Pet. 13a.]
>
> * * * * *
>
> I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans much have been talking to someone who had discussed the matter with me.
>
> No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it. [Presidential News Conference, January 31, 1973.]

c. Petitioner blandly explains away his admissions as a case of mistaken identity (Pet. 6); he contends that he really fired another civil servant, Gordon Rule, who had criticized his appointment of Roy Ash to the Bureau of the Budget.[4/] But there is ample evidence that he was indeed talking about Fitzgerald, who came to his attention by having testified to Congress about cost overruns on the C-5A military transport plane, For example, petitioner told John Ehrlichman the reason for the firing:

> Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly]. [Pet. 20a.]

4/ Memorandum in Support of Motion by Defendant Nixon For Summary Judgment on Grounds of Immunity and the Absence of Wrongful Conduct at 14 (Feb. 11, 1980).

The "mistaken identity" claim also fails to explain why, during Fitzgerald's Civil Service appeal of his firing, petitioner authorized the repeated use of executive privilege by Secretary of the Air Force Seamans to conceal the White House role. (Pet. 8a.)[5/]

d. Petitioner suggests that Fitzgerald's job was abolished in a routine reorganization and that the White House staff only feared that this would be "perceived" as retaliatory. (Pet. 4.) On the contrary, the Secretary of Defense

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5/ Petitioner was told that "Seamans was wrong, he had no right to invoke it," but that the White House staff was "coverin' your tracks." (Pet. 17a.) He instructed his staff to "have the most godawful gobbledygook answer prepared. Just put it out on executive privilege. Something that will allow us to do everything that we want." (Pet. 15a.) It is little wonder that the District Court alluded to "White House prevarications and duplicity" and the fact that the White House "continued to conceal." (Pet. 9a, 10a.)

publicly admitted that it was a "firing";[6] memoranda to petitioner described it as a "purge";[7] petitioner remembered co-defendant Bryce Harlow as being "all for canning" Fitzgerald (Pet. 28a); and, as the District Court noted, such a firing had long been prohibited by criminal statute (18 U.S.C. § 1505), "a statute to which Mr. Nixon personally gave strong support while a member of the United States Senate." (Pet. 3a.)

In short, in his "natural eagerness to elicit from this Court a decision at the earliest possible moment," United States v. CIO, 335 U.S. 106, 129 (1948), petitioner is essentially asking the Court to find the facts or to render what will be at best an advisory opinion on a difficult constitutional question with "far-

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6/ Pl. Ex. 258.

7/ E.g., Def. Ex. 103.

reaching ramifications." (Pet. 9.)

3. The District Court Correctly Ruled That a President Is Not Absolutely Immune From All Civil Damages Liability.

The petition should also be denied because the District Court was correct. Respondents in Kissinger v. Halperin, No. 79-880, have stated all the reasons why the denial of absolute immunity is consistent with the decisions of this Court, and respondent adopts them in whole. But they apply with special force to this case, which does not involve any sensitive foreign policy, war-making or national security functions of the Presidency.

Thus, unless this Court is prepared to rule as a matter of law that a President is absolutely immune from civil damage liability for any conduct while in office, it should deny this petition. Here

the conduct presented constitutes the federal felony of retaliating against a congressional witness. But suppose the next case involves a President who orders a break-in to obtain embarrassing private information or to plant incriminating evidence? Or a President who orders the firebombing of an ideologically unpalatable think tank? Or a President who orders the payment of cash bribes to indicted felons to procure their silence? These questions, like the hypotheticals which petitioner poses with respect to foreign policy decisions of the President (Pet. 11), suggest the need for discrimination in the extension of official immunity, not the sweeping endorsement which petitioner seeks on a record which does not yet even establish what he did.

Yet, nothing short of such a sweeping ruling would prevent this case from

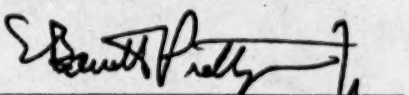
going to trial. The petition submitted by the Solicitor General in Kissinger, supra, declined to seek review of the Court of Appeals' denial of absolute immunity on the statutory claims in that case. The Solicitor General has thus implicitly acknowledged the "general rule * * * that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." Butz v. Economou, supra, 438 U.S. at 489. Consequently, were this Court to find petitioner absolutely immune from liability on the constitutional or common law claims in this case, the statutory claims (see Pet. 1a) would nevertheless go to trial. Given that probability, grant of the petition to review a pretrial order of the District Court on this record would be an improvidential use of the Court's time and merely

postpone a trial that will necessarily take place in any event.[8/]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



E. Barrett Prettyman, Jr.

8/ Even assuming that certiorari were granted in Kissinger, supra, we respectfully suggest that the reasons set forth in the text above and in Respondent's Reply to Petitioner's Motion for Expedited Consideration call for an outright denial of certiorari rather than holding this case until Kissinger is decided. There is strong evidence from petitioner's actions before the District Court and the Court of Appeals that what he primarily seeks is a delay of trial. Yet as shown above, a delay is not warranted regardless of the outcome in Kissinger, and respondent should be allowed to proceed with the long-delayed vindication of his claims.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief For Respondent in Opposition to Petition For a Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit has been hand-delivered this 6th day of May, 1980, to R. Stan Mortenson, Esquire, Miller, Cassidy, Larroca & Lewin, Suite 500, 2555 M Street, N. W., Washington, D. C. 20037, attorney for Petitioner Nixon.

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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

No. 79-1738

RICHARD NIXON, Petitioner,

v.

A. ERNEST FITZGERALD, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

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PETITION FOR A WRIT OF CERTIORARI
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COLUMBIA CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

Respondent A. Ernest Fitzgerald respectfully submits this Supplemental Brief to call the Court's attention to an intervening matter not available to the parties at the time of their last filings. In their briefs, both petitioner (Petition at 3, 7-8, 13; Reply at 5 n.1) and respondent (Opposition at 8) noted that this

case involves constitutional, statutory and common law claims, which was correct at the time the briefs were filed. However, in response to the District Court's expressed concern about the complexity of trying all of these claims to the jury and in order to simplify proposed verdict forms and jury instructions which were due to be submitted to the District Court on May 12, 1980, respondent Fitzgerald filed a paper with the District Court on Friday, May 9, 1980, voluntarily dismissing all of his common law claims. His remaining claims are based upon the First Amendment, 18 U.S.C. § 1505 and 5 U.S.C. § 7211.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Supplemental Brief has been mailed, first class, postage prepaid, this 14th day of May, 1980, to R. Stan Mortenson, Esquire, Miller, Cassidy, Larroca & Lewin, Suite 500, 2555 M Street, N. W., Washington, D. C. 20037, attorney for Petitioner Nixon.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

RICHARD NIXON, PETITIONER

v.

A. ERNEST FITZGERALD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS ALEXANDER BUTTERFIELD AND BRYCE HARLOW

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1738

RICHARD NIXON, PETITIONER

v.

A. ERNEST FITZGERALD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS ALEXANDER BUTTERFIELD AND BRYCE HARLOW

This is an action brought by respondent A. Ernest Fitzgerald to obtain monetary damages from petitioner Richard Nixon and respondents Alexander Butterfield and Bryce Harlow. Fitzgerald alleges that these individuals engaged in a conspiracy with "knowing intent to terminate [his] employment with the Air Force and to prevent his reinstatement as a government employee in retaliation for his congressional testimony" (Pet. App. 2a), in violation of the First Amendment, 5 U.S.C. (Supp. II) 7211 (Pet. App. 11a), and 18 U.S.C. 1505 (Pet. App. 11a-12a).[1] He seeks damages for the loss of his Air Force

[1]Fitzgerald has abandoned his other asserted bases for relief, including the Fifth Amendment (Pet. App. 4a) and District of Columbia common law (see Respondent Fitzgerald's Supplemental Brief 2).

position and the impairment of his future employment prospects.[2]

Petitioner Nixon moved for summary judgment on the ground that he was absolutely immune from damage suits arising out of his activities as President. Respondents Butterfield and Harlow also claimed an absolute immunity from suit as presidential advisors acting on behalf of the President. Relying on *Butz* v. *Economou*, 438 U.S. 478 (1978), and *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), the district court rejected the absolute immunity defense and set the case for trial (Pet. App. 2a-3a, 5a).

Petitioner Nixon and respondents Butterfield and Harlow immediately appealed the denial of their claim of absolute immunity. On April 30, 1980, a motions panel of the court of appeals summarily granted Fitzgerald's motion to dismiss the appeals (Pet. App. 35a-36a). Petitioner Nixon has now sought review in this Court. Respondents Butterfield and Harlow have petitioned for rehearing, with a suggestion for rehearing en banc, in the court of appeals, which petition is still pending.

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[2]Fitzgerald originally pursued his administrative remedies before the Civil Service Commission. The Commission found that his termination, although not prompted by his congressional testimony, had been based on other impermissible factors. Accordingly, the Commission ordered reinstatement and back pay. Apparently believing that such relief was not fully adequate, Fitzgerald then commenced the instant litigation. See, *e.g.*, *Fitzgerald* v. *Staats*, 578 F. 2d 435, 436-437 (D.C. Cir.), cert. denied, 439 U.S. 1004 (1978); *Fitzgerald* v. *United States Civil Service Commission*, 554 F.2d 1186, 1187-1188 (D.C. Cir. 1977); *Fitzgerald* v. *Seamans*, 553 F.2d 220, 222-223 (D.C. Cir. 1977).

This Court has recently granted certiorari in *Kissinger* v. *Halperin*, No. 79-880 (May 19, 1980), to review the decision of the court of appeals upon which the district court relied in rejecting the claim of absolute immunity in the instant case.[3] Because *Kissinger*, like the present case, involves the question whether the President and his advisors should be absolutely immune from suits for money damages arising out of their official duties, the

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[3]The district court has postponed the trial of this action pending this Court's decision in *Kissinger*.

Fitzgerald asserts (Br. in Opp. 8) that the defense of absolute immunity is limited to his constitutional claims and is inapplicable to the implied causes of action based on federal statutes. But petitioner correctly points out (Reply Br. 4 n.1) that the petition raises the issue of absolute immunity as a defense to all of Fitzgerald's theories of liability. As we explained in our Reply Memorandum in *Kissinger* (pages 1-2), "if, as we submit, the President (and his closest advisors) are entitled to immunity from damages liability for decisions made in the exercise of the President's official responsibilities under Article II of the Constitution, that immunity could serve as a defense to statutory as well as constitutional causes of action."

Court should hold this petition and dispose of it in light of the decision in *Kissinger*.[4]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1980

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[4]We note that other petitions raising this immunity issue are apparently being held pending decision in *Kissinger*. See *Mitchell* v. *Zweibon*, No. 79-881 (filed Dec. 7, 1979); *Nixon* v. *Smith*, No. 79-882 (filed Dec. 7, 1979); *Mitchell* v. *Forsyth*, No. 79-1120 (filed Jan. 18, 1980).

In addition to the immunity issue, this case also presents the question whether a pretrial rejection of the defense of absolute immunity is immediately appealable under 28 U.S.C. 1291. However, as Fitzgerald recognizes (Br. in Opp. 2 n.1), the question of appealability is closely related to the merits of the immunity claim. See also *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Abney* v. *United States*, 431 U.S. 651 (1977); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207-1209 (3d Cir. 1979), petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980); *McSurely* v. *McClellan*, 521 F.2d 1024, 1032 (D.C. Cir. 1975), aff'd in pertinent part, 553 F. 2d 1277, 1283-1284 n.18 (1976), cert. dismissed, 438 U.S. 189 (1978). Accordingly, the appealability issue should also be disposed of in light of the decision in *Kissinger*. We note, moreover, that this issue is currently before the court of appeals on the rehearing petition filed by respondents Butterfield and Harlow.

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OCTOBER TERM, 1979

RICHARD NIXON,
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A. ERNEST FITZGERALD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

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IN THE

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent seeks to avoid review of this case by arguing that there is no jurisdiction for the appeal, that there are disputed factual issues on the merits, and that a President simply should not be entitled to immunity from civil damages, at least on the allegations respondent levels in this case. None of these arguments undercuts the reasons previously provided for granting the petition.

1. a. Respondent's suggestion that the district court's order is not final for purpose of appeal under the collateral order doctrine—supposedly because the Court of Appeals for the District of Columbia Circuit has

"settled" the question as to a President's absolute immunity from civil damages—is frivolous. The decision in *Halperin, et al. v. Kissinger, et al.*, 606 F.2d 1192 (D.C. Cir. 1979), is now before this Court on the Solicitor General's petition for certiorari. (*Kissinger, et al. v. Halperin, et al.*, No. 79-880.) Until the Court acts on that petition, the issue is live, unsettled, and susceptible of collateral review. *See Helstoski v. Meanor*, No. 78-546 (June 18, 1979).

b. Respondent's argument that there are unresolved issues concerning the absolute immunity defense that render the order interlocutory is premised on a misquotation of the district court's decision. With regard to the absolute immunity defense, the district court stated:

> "Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin, et al. v. Kissinger, et al.*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979)." (Cert. Pet., App. A, 2a.)

That ruling ended the district court's inquiry into the absolute immunity matter, and *nothing* further with respect to that defense remains to be resolved at a trial on the merits. Respondent's argument to the contrary rests on that portion of the district court's order pertaining to the defense of "qualified immunity." There the district court stated:

> "In order to establish qualified immunity, each defendant must show that he was acting 'within the outer perimeters' of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. [Citations

> omitted.] Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct." (Cert. Pet., App. A, 2a-3a.)

Because the district court's decision with regard to the absolute immunity defense is final, it is appealable, and must be so in order for the defense to have meaning.

2. Respondent argues that review at this point is inappropriate because the parties dispute the underlying factual contentions which he believes should be resolved at trial. To this end, respondent has gone to considerable lengths to advocate his view of the merits and to highlight certain factual disputes between the parties. The flaw in this approach is that the absolute immunity defense is one which is totally independent of the factual issues. As we pointed out in the petition, Mr. Fitzgerald vigorously contends that Mr. Nixon purposely and maliciously ordered that his employment be terminated and cites carefully selected portions of Mr. Nixon's tape recorded conversations following his press conference of January 31, 1973 to buttress his viewpoint. Petitioner, on the other hand, maintains that he did not order Mr. Fitzgerald's termination, that the tape recordings, when read in their entirety, demonstrate that his statements concerning Mr. Fitzgerald were the result of his confusion about events that occurred some three years earlier, and that far from firing Mr. Fitzgerald for testifying before Congress about an earlier administration's mismanagement, Mr. Nixon actually attempted to find him suitable employment within the White House Office itself. But whether petitioner's or respondent's view of the facts is correct or not is immaterial for

purposes of the absolute immunity defense. In granting the petition, there is no reason for this Court to resolve whether Mr. Nixon in fact fired Mr. Fitzgerald. The only question presented for the Court is whether a President can be required, in response to a complaint seeking money damages, to prove at a trial on the merits whether his conduct was proper. Deferring consideration of the absolute immunity issue until after a jury's verdict would add nothing to this Court's basis for considering that issue. It would, however, frustrate a principal purpose of the defense.

3. The third reason respondent advances for avoiding review now is simply that a President should not be entitled to absolute immunity from civil damages, at least on the facts he alleges occurred here. Respondent does not dispute the significance of the issue the petition presents; nor does he suggest that it is one unworthy of this Court's consideration. Instead, he describes this case as one involving a President's intentional violation of a criminal statute and, based upon that description, argues that absolute immunity from civil damages should not be available under those circumstances. These arguments, of course, go to the question of whether absolute immunity from civil damages should be available to the highest executive official in the United States and, if so, under what circumstances. They are not arguments justifying denial of the petition.[1]

---

[1] In the same vein, respondent argues that the Court should not grant the petition because even if the Court concludes that petitioner is entitled to absolute immunity on the constitutional and common law claims, he would have to face a trial on the implied statutory causes of action. However, the petition raises the issue of absolute immunity in all three contexts. Consequently, a ruling in petitioner's favor on the issue presented would negate the need for trial altogether.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF MORTON, INA, DAVID, MARK AND GARY HALPERIN TO INTERVENE AND FOR OTHER RELIEF

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MOTION OF MORTON, INA, DAVID, MARK AND GARY HALPERIN TO INTERVENE AND FOR OTHER RELIEF

Morton, Ina, David, Mark, and Gary Halperin — the respondents in *Kissinger* v. *Halperin,* No. 79-880 — respectfully move the Court for leave to intervene in the instant case. As set forth below, the Halperins have a vital interest in the disposition of this case that is not being adequately represented by either petitioner or respondent.

BACKGROUND

At the direction of then President Nixon, federal agents maintained a warrantless wiretap on the Halperins' home telephone for twenty-one months. After learning of this

surveillance, the Halperins filed suit seeking damages from Nixon and other responsible officials under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2520, and under the Fourth Amendment.[1]

Following a decision in the United States Court of Appeals for the District of Columbia Circuit which remanded the case for further proceedings on terms that were favorable to the Halperins in all respects, *Halperin* v. *Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979), this Court on May 19, 1980, granted certiorari to consider whether the President is absolutely immune from suits for damages arising from violations of citizens' constitutional rights and, if so, whether the President's closest advisers enjoy a derivative absolute immunity. *Kissinger* v. *Halperin,* No. 79-880.[2] On June 22, 1981, by an equally divided vote, Justice Rehnquist not participating, the Court affirmed the decision of the court of appeals with respect to Nixon, Kissinger, and Mitchell and dismissed as improvidently granted the writ of certiorari with respect to Haldeman. On the same day, the Court, without any recusals indicated, granted Mr. Nixon's petition for certiorari in the instant case, as well as the separate petition for certiorari filed by his two co-defendants. *Harlow* v. *Fitzgerald,* No. 80-945.

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[1]The Halperins also seek damages from Henry Kissinger, John Mitchell, and H. R. Haldeman.

[2]Review in *Kissinger* was also granted on the questions of whether petitioners are entitled to qualified immunity on the ground that the law regarding electronic surveillance was unsettled at the time of the Halperin wiretap and whether the decision below unfairly imposes retroactive liability. However, the Solicitor General expressly limited the petition in *Kissinger* v. *Halperin* to the issue of immunity from constitutional claims and did not raise any issue with respect to the Halperins' statutory claims. (Pet. 10 n.8; Pet. Br. 10 n.16.)

On July 16, 1981, the Acting Solicitor General filed a petition for rehearing in *Kissinger* v. *Halperin* in which he suggested that the Court hold that case pending decision in *Nixon* v. *Fitzgerald* and *Harlow* v. *Fitzgerald* and then dispose of it in light of that decision. Thus, the *Halperin* case has become closely linked with the *Fitzgerald* case.

Furthermore, because of a secret agreement between Nixon and Fitzgerald, it is apparent that Nixon's primary interest in the instant case is gaining a second chance at defeating the Halperins. This agreement was entered into in the spring of 1980 when, despite the pendency of the petition for certiorari in *Kissinger* v. *Halperin,* the district court declined to postpone the trial in Fitzgerald's case which was scheduled to begin on June 4, 1980. (Pet. 15.) In order to avoid a trial on Fitzgerald's claims, Nixon agreed to pay Fitzgerald $144,000 immediately and to pay him an additional $34,000 if Nixon's appellate efforts to dismiss the case are ultimately unsuccessful. In exchange for those payments, Fitzgerald agreed that the case would never go to trial. After this Court granted review in *Kissinger,* the district court stayed the *Fitzgerald* trial pending a decision in *Kissinger,* and the grant of review in this case has further postponed any trial. Nonetheless, the impact of this agreement is clear: if Nixon wins in this Court, his case against Fitzgerald is over, but Fitzgerald keeps his $144,000. If Nixon loses, he will have to pay an additional $34,000, but he will never have to face a public trial on Fitzgerald's claim in either event. Because of the relation of this case to *Kissinger* v. *Halperin,* the Halperins seek leave to intervene and suggest other actions which they believe this Court ought to take at this time.

ARGUMENT

I

The Court in the past has permitted parties who did not participate in the proceedings below to intervene in pending cases in order to protect their interests. *NLRB* v. *Acme Industrial Co.*, 384 U.S. 925 (1966) (order granting intervention), 385 U.S. 432 (1967) (decision on the merits); *United States* v. *Terminal Railroad Ass'n*, 236 U.S. 194, 199 (1915). In *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 176-178 (1948), although denying intervention, the Court relied on the standard of Rule 24(a)(2), Fed. R. Civ. P., which at that time provided that a party would be permitted to intervene in a district court "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Because the Halperins plainly meet these criteria, they should be permitted to intervene.

The Solicitor General's petition for rehearing in *Kissinger v. Halperin* demonstrates that the Halperins' interests are vitally affected by the outcome in this case. Indeed, even if the Court denies the petition for rehearing, a decision upholding absolute immunity in *Nixon* v. *Fitzgerald* might seriously impair the Halperins' suit in the lower courts. Furthermore, Nixon's $144,000 payment to Fitzgerald, the $34,000 limitation on Nixon's further liability to Fitzgerald, and the agreement that Fitzgerald can never take Nixon to trial demonstrate that Nixon's principal interest here is a second try at defeating the Halperins. Thus, the Halperins should be permitted to participate in this case, since their interest in its outcome is at least as great as the fixed sum which Fitzgerald has at stake.

Moreover, Fitzgerald will not adequately represent the Halperins' interests because of significant differences between the two cases. If permitted to intervene, the Halperins will argue, for reasons that are adverse to Fitzgerald's interests, that this case can be disposed of without reaching the question of whether Nixon is absolutely immune from damage suits for all constitutional torts. The Halperins, and they alone, will argue that the case should be remanded to the court of appeals to consider (1) whether Nixon is entitled to absolute immunity from Fitzgerald's claims, which are readily distinguishable from the Halperins' claims, and (2) whether Fitzgerald's claims against Nixon should be dismissed without reaching the issue of absolute immunity. These are arguments which neither petitioner nor respondent will raise in this Court, because Nixon seeks a ruling on presidential immunity that will protect him from the Halperins' claims, and Fitzgerald cannot be expected to present the flaws in his own case.

At the outset, it is important to note that Nixon's appeal from the district court's denial of his motion for summary judgment on absolute immunity grounds was dismissed by two judges of the court of appeals for lack of jurisdiction. (Pet. App. 36a.) This dismissal was contrary to the rule in the District of Columbia Circuit that such orders are appealable under 28 U.S.C. § 1291. *Dellums* v. *Powell,* No. 80-1331, Slip Op. at 4 (D.C. Cir., July 24, 1981); *Briggs* v. *Goodwin,* 569 F.2d 10, 58-60 (D.C. Cir. 1977) (Wilkey, J., writing separately for the court on appealability), *cert. denied,* 437 U.S. 904 (1978); *McSurely* v. *McClellan,* 521 F.2d 1024, 1030-1032 (D.C. Cir. 1975), *aff'd in pertinent part en banc,* 553 F.2d 1277, 1283-1284 n.18 (1977), *cert. dismissed,* 438 U.S. 189 (1978). *See Helstoski* v. *Meanor,* 442 U.S. 500 (1979); *Abney* v. *United States,* 431 U.S. 651

(1977). Thus, the Halperins agree with Nixon that the court of appeals erred in refusing to hear Nixon's appeal. However, contrary to Nixon's submission (Pet. 13-14 n.2), the Halperins urge that the court of appeals be given an opportunity to rule on the merits of the *Fitzgerald* case prior to this Court's review.[3]

Contrary to Nixon's contention (Pet. 13-14 n.2), the outcome of the court of appeals' review in this case would not necessarily be dictated by that court's decision in *Halperin* v. *Kissinger*. Fitzgerald's claims against Nixon are quite different from the Halperins' claims against Nixon, and the court of appeals might find that absolute immunity is appropriate in *Fitzgerald*. Fitzgerald asserts that he was fired from his job in the Department of Defense because he gave testimony to a congressional committee in which he predicted massive cost overruns in the development of an aircraft. He seeks to convert the common law torts of interference with economic advantage and infliction of emotional distress into constitutional claims by alleging that Nixon violated his First Amendment rights by firing him in retaliation for his testimony. *Fitzgerald* v. *Seamans*, 553 F.2d 220, 223-226 (D.C. Cir. 1977).[4] This is a far cry from the Halperin's case where Nixon directed his subordinates to take action which itself directly violated the Fourth Amendment. The Halperins' case presents as stark a violation of constitutional rights as did the forcible, warrantless entry in *Bivens* v. *Six Unknown Named*

[3]The recent decision of the Court of Appeals for the District of Columbia in *Dellums* v. *Powell* demonstrates that the dismissal of Nixon's appeal was an intra-circuit aberration rather than a conflict between the circuits worthy of this Court's review as Nixon mistakenly contends. (Pet. 14 n.3.)

[4]This case provides a fuller statement of Fitzgerald's claims than do the petition for certiorari and brief in opposition now before the Court.

Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Fitzgerald's case, however, presents a far more attenuated constitutional claim and one for which absolute rather than qualified immunity might be appropriate.

Furthermore, the court of appeals might find that Fitzgerald's case should be dismissed without reaching the immunity issue. It is the rule in the District of Columbia Circuit, as elsewhere, that when an appellate court has before it a proper appeal from a collateral order denying absolute immunity, it may also review other issues on which the district court has ruled. *Dellums* v. *Powell, supra*, Slip Op. at 5 n.6. Thus, the court of appeals could have considered whether Fitzgerald has stated a claim for damages arising from a violation of his constitutional rights. In fact, there are two grounds on which the court of appeals might decide that Fitzgerald has not stated such a claim.

First, the court might follow the decision in *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981), which held that civil service employees, such as Fitzgerald, who are fired in alleged retaliation for the exercise of their First Amendment rights, have no cause of action under the First Amendment in view of (1) the special relationship between the federal government and its employees, and (2) the alternative remedies which are available to them under the civil service system. The Fifth Circuit in *Bush* found that these were special factors which counsel against recognizing a constitutional cause of action when a federal employee is fired under such circumstances. *See Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra*, 403 U.S. at 396. Such an argument might be particularly persuasive in Fitzgerald's case since he has obtained back-pay

and reinstatement under the scheme which Congress has enacted to protect federal employees. (Pet. 6.)

Second, the court of appeals might conclude that the speech for which Fitzgerald was allegedly fired is not protected by the First Amendment and that therefore he does not have a constitutional claim. If Fitzgerald has not stated a claim that his constitutional rights have been violated, then the defendants plainly enjoy absolute immunity from what is a common law tort. *Butz* v. *Economou,* 438 U.S. 478 (1978); *Barr* v. *Matteo,* 360 U.S. 564 (1959). In *Pickering* v. *Board of Education,* 391 U.S. 563, 570 n.3 (1968), this Court recognized that even truthful public criticism by a subordinate of his superiors might be grounds for dismissal where the need for confidentiality is great or where public criticism would seriously undermine the working relationship between them. Indeed, a number of lower courts have relied on *Pickering* to hold that criticism by public employees of their superiors is not protected by the First Amendment. *See* cases collected in Justice Rehnquist's dissent from the denial of certiorari in *Saye* v. *Williams,* No. 80-1123 (June 8, 1981). Thus, there is a substantial question whether the speech on which Fitzgerald bases his complaint is protected under the First Amendment.

These issues, which only the Halperins will raise, demonstrate that they should be granted leave to intervene. Moreover, these unresolved issues dictate a remand to the court of appeals for consideration there in the first instance without further review in this Court. However, they also are grounds on which this Court might wish to decide this case. In that event, the Court should request further briefing on these additional questions and permit the Halperins to intervene for that purpose.

II

A number of the facts supporting intervention also demonstrate that this case is an inappropriate occasion for the Court to decide whether the President enjoys absolute immunity from civil liability for actions which violate the constitutional rights of citizens. Accordingly, the Halperins urge the Court to dismiss the writ as improvidently granted.

The issue in the *Fitzgerald* case is not whether Nixon is absolutely immune, for he has already paid Fitzgerald $144,000. Instead, the issue is whether Nixon can limit his liability to that amount and avoid paying Fitzgerald a relatively modest additional sum of money. Although Nixon asserted that the burden of enduring a trial in *Fitzgerald* was an important reason for granting his petition for certiorari (Pet. 15), he bought his way out of that trial while the petition was pending. Nixon's petition in the *Fitzgerald* case represents little more than a $34,000 wager on how this Court will rule on an issue which Nixon has largely conceded to Fitzgerald by paying him $144,000.

Furthermore, on June 18, 1980, before review was granted, counsel for Nixon and Fitzgerald filed a Joint Statement of the Parties in which they denied press reports that the case had been settled and affirmatively stated: "The parties have agreed at this stage to fix the amount of payments to which respondent *would be* entitled in this case, but the amount of payment depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court." (Emphasis added.) By indicating that any payment would be prospective, and hence dependent on future action by this Court and the district court, counsel may have misled the Court by not revealing the fact that Nixon had already paid Fitzgerald

$144,000 and that this payment will be unaffected by any subsequent judicial action. This may provide yet another reason for dismissing the writ.

An additional reason for dismissing the writ as improvidently granted is that Nixon's effort to win the *Halperin* case through the *Fitzgerald* case apparently presents Justice Rehnquist with the same cause for recusal which constrained him from participating in *Kissinger* v. *Halperin.* As we have demonstrated, the Halperins, not Fitzgerald, are Nixon's real target in this case. Moreover, the Solicitor General's petition for rehearing firmly links the two cases. If we are correct that the identity of interests in the two cases will require Justice Rehnquist to recuse himself from *Nixon* v. *Fitzgerald,* then it will be an improvident allocation of the Court's resources to address once again the issue of presidential immunity with the possibility of another four-four deadlock.

CONCLUSION

The Halperins believe that the most appropriate disposition of *Nixon* v. *Fitzgerald* would be for the Court to dismiss the writ as improvidently granted for the reasons relating to the Nixon-Fitzgerald agreement and the linkage of the *Halperin* and *Fitzgerald* cases. However, if the Court proceeds with plenary consideration of this case, the Halperins should be allowed to intervene in order to raise the issues discussed in Point I, primarily as grounds for remanding the case to the court of appeals or alternatively as grounds for this Court's decision on the merits. Finally, the Halperins respectfully suggest that the linkage of this case with their's may require Justice Rehnquist to recuse himself for the same reasons that he declined to participate in *Kissinger* v. *Halperin*.

Respectfully Submitted,

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Nos. 79-1738 and 80-945

IN THE

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On Writ of Certiorari to the
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MOTION OF JUDITH CLARK, DANA BIBERMAN, NATALEE ROSENSTEIN, EVE ROSAHN AND JANE SPIELMAN TO INTERVENE AND FOR OTHER RELIEF

(For appearances, please see reverse side of cover.)

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Preliminary Statement

Judith Clark, Dana Biberman, Natalee Rosenstein, Eve Rosahn and Jane Spielman (hereinafter "Clark plaintiffs"), plaintiffs in Judith Clark, et al. v. United States of America, Richard Nixon, et al., 78 Civ. 2244 (S.D.N.Y.) (Lasker, J.), respectfully move the Court for leave to intervene and other relief in the instant case. The Clark plaintiffs have a compelling interest in the instant matter that is not or cannot be represented by either petitioners or respondent.

As is more fully set forth below, the interest of the Clark plaintiffs in the instant matter warrants a grant of

leave to intervene. First and foremost, it is the Clark plaintiffs' contention that the failure of the parties hereto to advise this Court of the settlement reached, constitutes a fraud, and, for this reason alone, the writ should be dismissed as improvidently granted. Second, the issues before the Court are moot and fail to come within the parameters of a "case and controversy" as defined by Article III of the U.S. Constitution.

Background

Clark v. U.S.A. arises from illegal and unconstitutional counter-intelligence programs carried out by agencies and officials of the United States government (hereinafter "COINTELPRO"). Extensive documentation has already been provided concerning the scope of COINTELPRO by the Senate Select Committee on Intelligence

Activities ("Church Committee"), grand jury investigations, criminal trials of two of the defendants in Clark, and reports in the media.

As some of the victims of COINTELPRO activities, the Clark plaintiffs' homes were burglarized, their telephones tapped and they were targets of assaults, kidnap plots and extensive surveillance and harassment. All such activities, as alleged in the Clark action, were carried out by employees and officials of the United States government under the direction of the highest government officials, and, as is particularly pertinent to this motion, then President Richard Nixon.

The aforesaid investigations and documentation have revealed that hundreds of government officials were involved in the authorization, effectuation and subsequent cover-up of the acts committed

against the Clark plaintiffs. Four officials of the Federal Bureau of Investigation (all defendants in Clark) were indicted by Federal grand juries for acts directed against the Clark plaintiffs (United States v. L. Patrick Gray, et al., D.D.C., 78-000179; United States v. Kearney, S.D.N.Y., 77 Crim. 0245). Former F.B.I. Assistant Director W. Mark Felt and Associate Director Edward S. Miller were, in fact, convicted, although subsequently pardoned by President Reagan.

Nixon, as a defendant in Clark, is charged with actively approving and directing a program of criminal and unconstitutional activities against the Clark plaintiffs and others.

In the more than three years since Clark has been pending, Nixon has made every effort to avoid defending himself on the merits. He first moved in the

District Court to dismiss the action as to him on the ground of absolute Presidential immunity. His motion was denied by the Hon. Morris E. Lasker, who, ruled, inter alia, that

> "Considering together the Scheuer holding that the highest official of the state is only qualifiedly immune from suit, and the Butz ruling that state and federal officials are to be treated alike for purposes of immunity, it follows necessarily that the highest official of the United States ordinarily enjoys a qualified immunity only.
>
> ...
>
> Whichever may be the proper construction the conclusion that Nixon is not absolutely immune in this case is the same.

481 F.Supp. 1086, 1091 (S.D.N.Y., 1979).

Despite the District Court's rejection of Nixon's claim of absolute immunity, and his key role in the conspiracy against the plaintiffs, the Clark plaintiffs have two years later, still been unable to proceed against Nixon. First, all proceedings against him were stayed

during the pendency of his motion to dismiss. After the denial of this motion, he filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

Prior to his appeal being briefed or argued, Nixon moved the Second Circuit to stay its determination of his appeal, solely upon the basis of the pendency of his petition for certiorari, filed before this Court in Kissinger v. Halperin, 606 F.2d 1192 (D.C.Cir., 1979), aff'd. No. 79-880 (June 22, 1981). In an order dated March 11, 1980, the Second Circuit denied Nixon's motion for a stay with leave to renew should this Court grant certiorari in Kissinger v. Halperin. The Second Circuit heard the Nixon appeal in Clark on May 28, 1980 and reserved decision. Nixon thereafter renewed his motion for a stay, this Court having granted certiorari in Kissinger v.

Halperin, supra. As a result, the Second Circuit granted Nixon's application for a stay of its determination 624 F.2d 3 (1980).

Nixon then moved the District Court to stay all proceedings against him pending this Court's determination of Kissinger. In an order dated January 6, 1981, Judge Lasker granted the stay, further delaying the Clark plaintiffs' ability to proceed against Nixon in any fashion or in any forum.

Despite this Court's affirmance of the lower court's rejection of Nixon's claim of absolute immunity, Nixon has utilized subsequent determinations of this Court to further delay his responsibility to answer the allegations in Clark. Thus, when this Court granted certiorari in the instant action, Nixon once again moved the Second Circuit for continuation of the stay of its determination of his

appeal in Clark, claiming that Fitzgerald --no longer Kissinger--would be dispositive of his appeal in Clark. Nixon asserted this position despite the fact that by this Court's determinations in Kissinger and Smith v. Nixon, 50 U.S.L.W. (June 29, 1981), he is now required to be an active litigant in two separate actions.

As a result of the foregoing, all proceedings against Nixon in Clark have been stayed for the entire duration of Clark's pendency. Having lost in every court in which he has raised the claim of absolute immunity, Nixon now seeks this Court's consideration in the instant action. In light of the fraud the parties in this action have apparently sought to foist upon this Court as a result of their prior settlement, the proposal of petitioners' Harlow and Butterfield that the instant action

warrants the "formulation of a comprehensive immunity test," and the Clark plaintiffs' direct interest, they seek leave to intervene.

ARGUMENT

Point I - The Clark Plaintiffs Should Be Permitted to Intervene

Federal law has permitted intervention before this Court by parties who, while being affected by a Court's determination of a pending case, will not have their interest represented by the litigants before the Court. Certainly such is the case where there is a common question of law or fact. F.R.C.P. Rule 24(b)(2). The interests of justice demand that such intervention is appropriate if the interests of the intervenor are at stake. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Terminal Railroad Asso-

ciation, 236 U.S. 194 (1915).

The Clark litigation is directly tied to the matter before this Court. Despite the rejection of Nixon's claim of absolute immunity in the District Court, the Clark plaintiffs are prevented from prosecuting their action against Nixon because of the pendency of the instant case.

Moreover, despite the significant differences in the allegations against Nixon in Clark and Fitzgerald, the Clark plaintiffs may be bound by any decision of this Court on the issue of absolute immunity in Fitzgerald. It is of more than passing interest, in this regard, that petitioners Harlow and Butterfield in response to the Halperin motion to intervene, apparently plan to argue that this Court should utilize Fitzgerald as the vehicle for a "formulation of a comprehensive immunity test." Certainly,

regardless of outcome, the Clark plaintiffs are entitled to be heard on such an issue of such fundamental impact upon their action and, accordingly, are entitled to the relief herein sought.

Point II - The Instant Matter Has a Direct Impact Upon Clark v. U.S.A.

The Clark plaintiffs have a compelling interest in the outcome of Fitzgerald, yet their interests are not represented by either party. The facts in Clark and the constitutional issues raised by it are fundamentally at odds with those in Fitzgerald. In Clark, Nixon is a central figure in a conspiracy to deprive the plaintiffs of their constitutional rights for a period in excess of ten years, not merely a witness to wrongdoing or even a participant in an isolated act against one individual. In Fitzgerald, Nixon's role has been described as tangential and

routine:

> "Here [Nixon v. Fitzgerald], eight years of exhaustive litigation have been spawned by an ordinary personnel decision, the kind of matter that routinely comes to the attention of Presidents and their senior advisers on a daily basis. If this case can go to trial, so too can hundreds of others which may be brought by persons aggrieved by decisions in which a President and his highest aides might have played some tangential role.

Petitioners' Harlow and Butterfield's Response to the Halperin Motion to Intervene (Emphasis supplied).

By contrast, in Clark, Nixon's role is hardly tangential or routine. Rather, he is alleged to have committed serious violations of constitutional, statutory and common law rights of the plaintiffs, in addition to utilizing his position to formulate, promote and direct other high government and F.B.I. officials to commit egregious and unlawful actions against the plaintiffs. The facts under-

lying Clark go far beyond actions that Nixon may have taken as an individual while he was President. Rather, they directly address and call into question the parameters of the powers of the presidency itself: May a President utilize his high office and powers to commit illegal acts, cover them up and then thwart any action against him for such conduct, relying solely upon a claim of presidential immunity?

Fitzgerald raises none of the questions briefly discussed above. The issue in Fitzgerald (indeed if any issue still remains) is whether Nixon is to be held liable for his role in firing Fitzgerald, and does not address the powers of the presidency or a president's participation in an illegal and unconstitutional conspiracy of massive proportion. Yet, the outcome of Fitzgerald may well determine such fundamental questions for

the plaintiffs in Clark and anyone else similarly aggrieved who seeks to redress legitimate grievances against the highest government officials. It is plainly not sufficient to assert, as do all parties in Fitzgerald in their responses to the Halperin motion, that the Clark plaintiffs might later attempt to distinguish their action should Nixon prevail in Fitzgerald. The mere fact that this Court is now hearing this case has allowed Nixon to continue to circumvent the law and use the federal courts for his own purposes. As discussed above, the Clark plaintiffs have been at all levels attempting to vigorously litigate their action against Nixon for more than three years. Despite the fact that Nixon lost his motion to dismiss in Clark in the District Court and lost his motion for summary judgment in Halperin in every Court, including this Court, he has been able to avoid all

aspects of this litigation, including the crucial one of discovery. The Supreme Court's grant of certiorari in Fitzgerald has once again given new life to Nixon's use of the courts to avoid litigation.

Such dilatory tactics have already had a markedly adverse impact on the Clark plaintiffs. The inability to move forward with discovery against a central figure like defendant Nixon is extremely damaging to the plaintiffs. In addition, the impact of this Court hearing Fitzgerald should be viewed along with other changing conditions, including the Presidential pardon of Mark Felt and Edward Miller (two other key defendants in Clark), the imminent issuing of new Executive Orders redefining the powers of the intelligence agencies and the expected repeal of the Freedom of Information Act, which make the litigation in Clark more and more difficult. If this

Court stands by its granting of certiorari in Fitzgerald, it may well be years before the Clark plaintiffs can proceed with their case against Nixon. At best, this constitutes an undue hardship on the Clark plaintiffs and, at worst, a grave miscarriage of justice.

A ruling for Nixon in Fitzgerald would mean that despite years of litigation and despite volumes of evidence from congressional investigations, Nixon would never have been held accountable for any of his violations of the Constitution and laws while acting as President of the United States. Furthermore, such a ruling would be a signal to the sitting President and other high government officials that they may proceed with any action, no matter how illegal or unconstitutional, without fear of civil litigation.

Point III - The Instant Matter Presents No Justicable Case and Controversy

This Court has repeatedly ruled that there must be an active dispute for the Court to adjudicate the issues before it. A matter must be a justicable case and controversy within the meaning of Article III of the U.S. Constitution in order for this Court to have jurisdiction.

It is well settled that it is not the province of this Court to issue advisory opinions or to adjudicate political questions or abstract questions of law. Muskrat v. United States, 219 U.S. 346 (1911); Luther v. Borden, 48 U.S. (How.) I(1839); Powell v. McCormack, 395 U.S. 486 (1969). The principles enunciated by the Court must be able to be implemented in the matter before the Court. Local No. 8-6, Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Missouri, 361 U.S. 363 (1960).

There is no such case and controversy before the Court in the instant matter. Fitzgerald and Nixon, as demonstrated by their settlement, have already determined the claims which were previously disputed. The terms of their "Agreement" state, inter alia, that:

> "All payments to Plaintiff Fitzgerald required of Defendant Nixon under the terms of this agreement are in consideration of the dismissal of Plaintiff's claims for alleged violation of his constitutional rights..."

(Emphasis supplied).

An essential element of the case and controversy requirement is that there must be a live dispute at the time that this Court considers the issues. A case will be moot if the controversy is no longer applicable because of intervening circumstances. Thus, in DeFunis v. Odegaard, 416 U.S. 312 (1974), the plaintiff's admission to law school and impending graduation, made moot any

claims that his rights had been violated.

Where the parties have settled their claims, no live case and controversy exists. The Clark plaintiffs will argue that the instant case is moot, and the writ must be dismissed as improvidently granted.

More than failing to present a justicable case and controversy, the instant case is before this Court as a result of a deliberate fraud. The parties, and in particular Nixon and Fitzgerald, misled the Court by failing to advise and actually denying that a settlement had been reached.

Not only did Nixon and Fitzgerald fail to inform the Court that a monetary settlement had been reached, they also did not state that their case would never go forward no matter what is the ultimate decision of this Court. Nixon may argue that the fact that a $26,000 wager exists

on the Court's ruling on the issue of absolute immunity means that a live controversy still exists. If that is true, however, he surely would have advised the Court of the existence of a settlement.

Instead, he has used this Court to manuever so as to not have to address serious allegations of Constitutional violations raised in Clark and other cases. Having lost in virtually every court that has considered his claim of absolute immunity, Nixon now seeks to redefine the jurisdiction granted to this court by the U.S. Constitution.

CONCLUSION

For all the reasons set forth above, the Clark plaintiffs respectfully move this court to dismiss the writ as improvidently granted. Should this Court proceed with consideration of this matter,

however, the Clark plaintiffs seek leave to intervene on the merits.

Respectfully submitted,

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER NIXON'S RESPONSE TO HALPERINS' MOTION TO INTERVENE AND FOR OTHER RELIEF

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After years of inaction while this litigation progressed through the lower courts and ultimately to this Court for review, the Halperins have filed a motion seeking the status of full-fledged parties to the case. This motion is also made the vehicle for a last minute attempt to have the writ dismissed as improvidently granted.

These requests are rationalized primarily on the basis of an agreement brought to this Court's attention by the parties more than a year ago in which former President

Nixon and respondent A. Ernest Fitzgerald fixed the amounts that were to be paid to Fitzgerald depending on this Court's disposition of the appeal. However, this agreement provides no basis either for dismissal of the writ or for the Halperins' intervention. The Nixon-Fitzgerald agreement continued the controversy between the parties over whether Mr. Nixon is liable to Mr. Fitzgerald for the claims asserted against him in this action. It has no effect on the prudential factors that make the case appropriate for discretionary review—the recurrent nature of the absolute immunity issue and its importance. Rule 17, Supreme Court Rules. Nor does it confer on the Halperins any interest in the *Fitzgerald* case, much less the kind of concrete interest needed to satisfy the strict standards applicable to attempts to join litigation for the first time in this Court.

1. *The Agreement.*—Petitioner and respondent disclosed the existence of their agreement to the Court nearly a year before the Court granted the petition. Joint Statement of the Parties, No. 79-1738 (filed June 10, 1980). It was evident in the Joint Statement's description of the agreement that the parties had fixed minimum and maximum recoveries and had, in the interest of providing a greater degree of certainty to both parties, provided for *some* payment to Mr. Fitzgerald. This was, we submit, a perfectly normal contractual limitation of liability which preserved dispositive legal issues for further litigation and not, as the movants claim, "a wager . . . on an issue which Nixon has largely conceded to Fitzgerald" (Motion, p. 9). Whether the payment was to be prospective—*i.e.*, with funds being transferred only after this Court's disposition of the case—or whether the minimum amount due was to be paid immediately upon execution of the agreement was then, and is today, of no relevance whatever. In order to avoid the inevitable filing of strike suits generated by the very kind of publicity that attended the Halperins' submission of their motion, the size of the minimum payment and the total amount payable if Mr. Fitzgerald were to prevail

were not disclosed and, in fact, were the subject of a confidentiality undertaking.[1]

Mr. Nixon did not by entering the agreement "concede" in any respect the issue of absolute immunity. The agreement explicitly stated that it did not constitute a concession by either party on any question in the case. Moreover, the circumstances under which the agreement was negotiated dispel any implication to the contrary.

The district court denied former President Nixon's motion for summary judgment based on absolute immunity on March 26, 1980. A firm trial date of June 4, 1980, had been set some time before, and the busy trial judge (Gesell, J.), having cleared his calendar for a trial likely to last more than one month, made clear his commitment to that date.

Mr. Nixon exhausted all conceivable means of obtaining immediate appellate review of the denial of his absolute immunity defense and a postponement of the trial. On April 11, he filed a notice of appeal from that ruling and also sought leave to pursue a discretionary appeal under 28 U.S.C. § 1292(b). On April 15, he requested a 30-day continuance of the trial to await this Court's decision on whether it would grant a writ of certiorari in *Halperin* v. *Kissinger*, No. 79-880. However, in orders issued on April 18, the district judge both refused to certify an interlocutory appeal and denied Mr. Nixon's request for a temporary stay of the trial. Shortly thereafter, the trial judge communicated directly with the court of appeals and urged it to rule "with expedition" on Fitzgerald's motion to dismiss Mr. Nixon's appeal on absolute immunity.[2] The court of appeals dismissed that appeal on April 30, 1980.

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[1] It is our understanding that the respondent is submitting the agreement as an exhibit to his response to the Halperins' motion.

[2] See Memorandum to Chief Judge Wright from Judge Gesell (April 24, 1980) (attached as Exhibit A).

Mr. Nixon filed his petition for certiorari to review that order on May 2, 1980, together with a motion for expedited consideration. Nevertheless, Mr. Nixon had no assurance, short of action by this Court, that he could be spared the burden of a trial. He was squarely confronted with the prospect of incurring the expense, in terms of both time and money, of more than two months of trial preparation and the trial itself, costs he never would recover even if this Court were later to decide that a President is entitled to absolute immunity in civil damage actions. These costs would, moreover, have constituted an irreparable impairment of at least one "underlying purpose" of the absolute immunity defense, which is "to grant [its beneficiaries] the right not to be subjected to trial." *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied*, —— U.S. —— (June 29, 1981).

It was in this no-win situation, where he could neither avoid nor recoup much of the expense against which absolute immunity was designed to protect, that Mr. Nixon concluded an agreement with Fitzgerald.[3] From Mr. Nixon's

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[3] The agreement provided for a payment to Fitzgerald of $142,000 regardless of the outcome of the case, a fraction of the amount fixed by Fitzgerald's expert as his compensatory damages and an amount comparable to the likely costs of litigation. Even as to this figure, Mr. Nixon's obligation under the agreement was to be reduced, up to $42,000, by whatever amounts Fitzgerald might be able to obtain from Mr. Nixon's co-defendants. The agreement also established that Fitzgerald would receive an additional $28,000 depending on the outcome of the appeal.

The agreement was reached in the early morning hours of May 19, the Monday after both the *Halperin* and *Nixon* petitions for certiorari had appeared on the Court's conference list, but several hours before the announcement as to their disposition. The parties' mutual uncertainty under these circumstances as to the future course of the litigation provided the setting for an agreement satisfactory to both parties, which would create a degree of certainty on the amount in controversy while continuing the dispute on the issue of liability.

perspective, the agreement made the best of this bad situation by preserving the opportunity to litigate his entitlement to absolute immunity while limiting his exposure to an amount comparable to the unrecoupable litigation expenses he was on the verge of incurring in any event. To characterize such an agreement, which continued litigation on absolute immunity when that right was threatened with irreparable damage, as a concession is particularly ironic and unjust.[4]

After the agreement was concluded, the parties disclosed its substance to the trial judge in chambers and, on the basis of this circumstance and this Court's grant of certiorari in *Halperin,* he stayed further proceedings in the trial court on May 22, 1980. Shortly thereafter, as has been noted, the parties informed this Court of the agreement in their Joint Statement filed June 10, 1980.

The Halperins belittle the additional $28,000 which is contingent on this Court's ruling on the validity of Mr. Nixon's absolute immunity defense, but cannot suggest that the amount is so trivial that the litigation is no longer an actual controversy. *See, e.g., Roe* v. *Wade,* 410 U.S. 113 (1973) (and cases cited therein). The sum in controversy is clearly important to the parties, and this Court has frequently decided important legal issues involving much less in terms of monetary interests. *Thompson* v. *City of Louisville,* 362 U.S. 199, 203-04 (1960) ($20 fine for loitering). The point of paramount importance is that the issue of absolute immunity merits review in this Court because it is of great continuing significance to the Presidency, the public generally, and the petitioner.

---

[4] The agreement was put in a form common in personal injury actions. Often an insurer and a plaintiff who strongly disagree on the issue of liability, but who at the same time do not wish to run the risk of an open-ended damage award, agree on the maximum potential liability in exchange for a guaranteed minimum, and then litigate only the issue of liability.

The agreement did put a fixed amount in issue in place of an unresolved controversy regarding Fitzgerald's actual damages. However, that amount can be won or lost only through the usual form of argument based on the record below and generally applicable principles of law. The parties are involved in a "wager" only in the sense that any two litigants who argue that a fixed money judgment should be affirmed or reversed are gambling on this Court's ruling on an issue of law. The agreement contemplates that the parties will actively attempt to prevail on whatever issues are properly raised in this Court, and they continue to do so.

2. *The Intervention Request.*—The Halperins' motion fails totally to identify any cognizable interest that would justify making them parties to this case. Their case bears no factual relation to Fitzgerald's, and they will not be bound by a judgment in his suit. Nor can they point to any "interest relating to the property or transaction which is the subject of [this] action" that would be "impaired" or "impeded" by any particular disposition of this case. See Rule 24(a), Federal Rules of Civil Procedure. They simply have no concrete stake in this case comparable to that of every other litigant that has been allowed to intervene as a party in the first instance in this Court.[5]

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[5] *E.g., Banks* v. *Chicago Grain Trimmers Assn.*, 389 U.S. 813 (1967), 390 U.S. 459 (1968) (beneficiary of workmen's compensation award allowed to intervene in case involving validity of that award); *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952) (real parties in interest allowed to intervene after standing of representative party questioned); *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194, 198 n.5 (1944) (party to administrative proceeding who was denied notice of initiation of judicial review allowed to intervene); *National Labor Relations Board* v. *Acme Industrial Co.*, 384 U.S. 925 (1966), 385 U.S. 432 (1967) (union allowed to intervene to litigate existence of employer's duty to bargain with it). See Stern & Gressman, *Supreme Court Practice*, at 436 (5th ed. 1978).

The Halperins' only "interest" in the *Fitzgerald* case is their concern that a ruling on an issue of law in that case may be given effect, through the doctrine of *stare decisis*, in their otherwise unrelated case. The Halperins share this legally insufficient "interest" with actual and potential litigants nationwide. This Court chooses its cases precisely so that it can resolve unsettled questions of law that are or will be presented in other cases. To our knowledge, it has never been suggested that a litigant's concern that a ruling by this Court will be applicable in its case alone justifies its intervention as an actual party here.

The Halperins' request for party status is also based on an asserted need to argue—following a remand to the court of appeals—(1) that a form of absolute immunity covering Fitzgerald's claims, but not theirs, should be recognized (Motion, pp. 5, 7), (2) that the facts of Fitzgerald's case do not give rise to an implied right of action (*id.* at 5-7), and (3) that any speech on which Fitzgerald's claims are based was not protected by the First Amendment (*id.*). Even if arguments, unsupported by interests, could furnish a basis for intervention, these would not fill the bill.

A remand to the court of appeals for reconsideration of the absolute immunity issue would serve no purpose and would impose gratuitous expense on the parties. The court of appeals dismissed Mr. Nixon's appeal, which raised only that question, on the basis of Fitzgerald's contention that the denial of Mr. Nixon's absolute immunity defense did not present a "serious and unsettled question" in light of the court of appeals' decision in *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). See Motion of Appellee to Dismiss for Lack of Jurisdiction, or, in the Alternative, for Summary Affirmance, pp. 5-8 (filed April 24, 1980). There have been no subsequent developments remotely suggesting that the court of appeals would now be willing to reverse field on an issue that it apparently did not previously regard as even "serious" or "unsettled." The distinction that the Halperins suggest might be drawn between

their case and this one can be found nowhere in the language or reasoning of that court's ruling in *Halperin*. The case is properly in this Court and should be decided without further proceedings below.

Mr. Nixon argued repeatedly in the district court, albeit without the Halperins' assistance, that Fitzgerald had no implied right of action. Those arguments were rejected. See, *e.g.*, Appendix A to the Petition in No. 79-1738, p. 1a. Taking his appeal only on the "collateral order," Mr. Nixon limited his notice of appeal to the issue of absolute Presidential immunity. However, it is our understanding that petitioners Harlow and Butterfield will brief and argue in this Court the issue of whether Fitzgerald has any implied right of action. The Halperins' participation in argument on this point is unnecessary.

With regard to the status of Fitzgerald's First Amendment rights, Mr. Nixon's position remains that Fitzgerald was not punished by anyone for engaging in protected speech. However, that issue could not be put in a form suitable for summary judgment in the district court by either party and its merits are not, therefore, reviewable in this Court or the court of appeals.

CONCLUSION

For the reasons set out above, the Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief should be denied in its entirety.

Respectfully submitted,

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Attorneys for Petitioner Richard Nixon

APPENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA
Washington, D. C. 20001

Chambers of
GERHARD A. GESELL
United States District Judge

April 24, 1980

MEMORANDUM

To: Chief Judge Wright

From: Judge Gesell

Re: A. Ernest Fitzgerald v. Alexander Butterfield, Richard Nixon, and Bryce Harlow, Appellants, Nos. 80-1406, 80-1407, and 80-1408

I am advised that defendants Butterfield, Nixon, and Harlow have noted appeals from my Order dated March 26, 1980, denying their motions for summary judgment, and that plaintiff has filed in your Court a motion to dismiss these appeals or, in the alternative, for summary affirmance, and a motion for expedited consideration.

This six-year-old case is now scheduled for three pretrial conference beginning May 2, 1980. A jury trial, scheduled last September to commence on June 4, 1980, is expected to last one month. I respectfully request, pursuant to paragraph IX.D.1.d of the Court's *Handbook of Practice and Internal Proceedings,* that the above-mentioned motions be handled with expedition. I would also seek authorization from your Court permitting me to

conduct the pretrial conferences as previously arranged. If the scheduled pretrial proceedings are postponed, the trial of the case will have to be delayed many months.

/s/ GAG

cc: George A. Fisher, Esquire
Clerk of Court

Curtis E. von Kann, Esquire
Mark S. Landman, Esquire
R. Stan Mortenson, Esquire

Counsel

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S OPPOSITION TO MOTION OF MORTON, INA, DAVID, MARK AND GARY HALPERIN TO INTERVENE AND FOR OTHER RELIEF

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Dated: August 24, 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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v,

A. ERNEST FITZGERALD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S OPPOSITION TO MOTION OF MORTON, INA, DAVID, MARK AND GARY HALPERIN TO INTERVENE AND FOR OTHER RELIEF

Respondent A. Ernest Fitzgerald respectfully submits this Opposition to Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief (Halperin Motion).

After having had their full day in this Court, the Halperins now seek another, to anticipate or avoid a possibly adverse precedent. They seek to distinguish their case

from this and they argue that because of an agreement between petitioner and respondent to limit damages in this case, petitioner Nixon is primarily interested in a second chance to defeat them. It is obvious that these arguments provide no basis for intervention.

Intervention in cases pending before this Court has been granted rarely, and then only in the most extraordinary circumstances. The mere possibility of an adverse precedent has never been ground for intervention. The place to distinguish any precedent that may be set by a decision in this case, is in the Halperins' own case. There, if the need should arise, the Halperins will be free to brief and argue in the appropriate lower courts the "significant differences" that they find between this case and their own.

Moreover, in attempting to list these "significant differences," the Halperin Motion conveys an essentially inaccurate picture of the record.* This is said to be for the purpose of presenting issues "which only the Halperins will raise" (Halperin Motion at 8). But to the extent that such issues may be appropriate, this Court can rely on the three petitioners already in the consolidated Fitzgerald cases, Nos. 79-1738 and 80-945, to present them. If these cases are to be heard by this Court, respondent Fitzgerald will vigorously present his case, as

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* Thus, Fitzgerald's claim is based not merely on the Constitution and common law torts (Halperin Motion at 6) but also on the violation of two Federal statutes expressly intended to protect the rights of government employees to communicate with Congress. 5 U.S.C. § 7211 and 18 U.S.C. § 1505. Although more than eleven years have now passed since the date of his firing, Fitzgerald has still not been reinstated in a position equivalent to that from which he was fired (Halperin Motion at 7-8). *Fitzgerald v. Hampton*, C.A. No. 76-1486 (D.D.C. Mar. 3, 1981). Fitzgerald's protected speech was not criticism of his superiors (Halperin Motion at 8), but rather the admittedly truthful account of a substantial cost overrun in testimony before a Congressional Committee with the express permission of his superiors.

he has with marked success in other tribunals over the past eleven years.

For these reasons, respondent opposes the motion to intervene, although he remains of the view that this case is inappropriate for review by this Court for the reasons stated in his brief in opposition to the petition for certiorari.

The Halperin Motion also refers to the agreement between Fitzgerald and petitioner Nixon which was disclosed to this Court by the Joint Statement of the Parties filed on June 10, 1980, not June 18, 1980, as stated in the Halperin Motion at 9. A copy of the agreement with attached memorandum and joint statement is attached hereto. As recited in the joint statement, the agreement provides for payment based on this Court's decision on the then pending petition for certiorari and on subsequent proceedings in the District Court. From respondent Fitzgerald's point of view, by giving up the possibility of an ultimately larger jury award, he gained the assurance of a minimum recovery, even if this Court should rule against him on the immunity issue. Under the agreement, there remains the sum of $28,000 to be paid, or not, depending on the outcome of the case.

Respectfully submitted,

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Dated: August 24, 1981

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178

A. ERNEST FITZGERALD,
Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, RICHARD M. NIXON, AND BRYCE N. HARLOW,
Defendants.

AGREEMENT

It is agreed by and between Plaintiff A. Ernest Fitzgerald and Defendant Richard Nixon, through their counsel, this 18th day of May 1980 as follows:

1. On or before May 31, 1980, Defendant Nixon shall pay to Plaintiff Fitzgerald the sum of $100,000.

2. On or before June 30, 1980, Defendant Nixon shall pay Plaintiff Fitzgerald the additional sum of $42,000.

3. If the United States Supreme Court at any time grants Defendant Nixon's now-pending petition for a writ of certiorari, Docket No. 79-1738, then Defendant Nixon will pay Plaintiff Fitzgerald the additional sum of $28,000, above and beyond the amounts specified in Paragraphs 1 and 2 hereof, except that no payment shall be due under this paragraph if upon remand by the Supreme Court, the District Court dismisses the case as to Defendant Nixon without additional adjudication of the facts, other than upon the record as it presently stands.

Any payment required of Defendant Nixon under this paragraph shall be made within 30 days of the District Court order referred to above determining, upon remand, whether or not to dismiss the case as to Defendant Nixon.

4. If, on or before June 30, 1980, the United States Department of Justice has paid or has made a commitment to pay some or all of the costs and expenses (but not attorneys' fees) incurred by the Plaintiff and his counsel, Defendant Nixon's obligation under Paragraph 2 of this agreement will be reduced by the amount that the Department of Justice has paid or has made a commitment to pay. If Defendant Nixon should at any time become obligated to pay the $28,000 provided for under Paragraph 3 of this agreement, this amount shall be increased by the amount by which the payment under Paragraph 2 was or was to be reduced.

5. Upon the payment of the full amount due under the terms of this agreement, Plaintiff Fitzgerald and Defendant Nixon will promptly execute and file a stipulation dismissing with prejudice all claims against Defendant Nixon.

6. If Defendant Nixon should die before all payments required of him under the terms of this agreement have been made, then any payments which remain to be paid after his death shall be made by his estate.

7. If Plaintiff Fitzgerald should die before all payments due him under the terms of this agreement have been made, then any payments which remain to be paid after his death shall be made to his estate.

8. All payments to Plaintiff Fitzgerald required of Defendant Nixon under the terms of this agreement are in consideration of the dismissal of Plaintiff's claims for alleged violation of his constitutional rights and consequent mental distress and suffering, all of which claims are denied by Defendant Nixon here. This agreement

does not constitute any admission by Defendant Nixon of the validity of any of the claims and allegations set forth in Plaintiff's complaint.

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Richard M. Nixon

MEMORANDUM OF COUNSEL

Undersigned counsel for the parties agree that it is in the interests of both parties that all the terms of the settlement agreement entered into this date remain confidential. Accordingly, counsel shall in good faith impress upon their respective clients the need for confidentiality with regards to the terms of settlement and will solicit their cooperation with regard thereto.

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Richard M. Nixon

DATED: May 18, 1980

[Received Jun. 10, 1980]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1738

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

JOINT STATEMENT OF THE PARTIES

Petitioner Richard Nixon and respondent A. Ernest Fitzgerald, by their undersigned counsel, jointly submit this statement to inform the Court concerning certain matters that have been the subject of erroneous news reports, which may have come to this Court's attention, and which concern the status of this case. The parties have learned that, following the announcement of this Court's May 19, 1980, action granting the petition for writ of certiorari in *Halperin* v. *Kissinger*, No. 79-880, some news agencies speculated that the instant action had been settled. This is incorrect. The parties continue vigorously to dispute whether the petitioner can be held liable to respondent in this case, a question presented to this Court by the instant petition. The parties have agreed at this stage to fix the amount of payments to

which respondent would be entitled in this case, but the amount of payment depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court. Therefore, the case has not been settled and is not moot.

Respectfully submitted,

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CLERK

Nos. 79-1738, 80-945

IN THE

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BRYCE N. HARLOW
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A. ERNEST FITZGERALD,

Respondent.

PETITIONER NIXON'S RESPONSE TO MOTION OF JUDITH CLARK, DANA BIBERMAN, NATALEE ROSENSTEIN, EVE ROSAHN AND JANE SPIELMAN TO INTERVENE AND FOR OTHER RELIEF

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IN THE

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Respondent.

PETITIONER NIXON'S RESPONSE TO MOTION OF JUDITH CLARK, DANA BIBERMAN, NATALEE ROSENSTEIN, EVE ROSAHN AND JANE SPIELMAN TO INTERVENE AND FOR OTHER RELIEF

The plaintiffs in *Clark v. United States*, 78 Civ. 2244 (S.D.N.Y.), have followed the Halperins in moving for leave to intervene and for dismissal of the writ as im-

providently granted. The motion consists primarily of an extended diatribe against former President Nixon, his government counsel in the *Clark* suit, and his private counsel in this action. However, the *Clark* plaintiffs' immediate complaint appears to concern District Judge Morris Lasker, the United States Court of Appeals for the Second Circuit and this Court, whose actions are said to have unjustly delayed proceedings, particularly discovery, in the *Clark* case.[1] This Court is singled out as having "allowed Nixon to continue to circumvent the law and use the federal courts for his own purposes" and "given new life to Nixon's use of the courts to avoid litigation." Motion, p. 2.

In Petitioner Nixon's Response to the Halperins' Motion to Intervene and for Other Relief (filed herein August 24, 1981), we discussed the reasons why the Nixon-Fitzgerald limitation-of-liability agreement does not affect the propriety of this Court's consideration of the issue of absolute Presidential immunity and why litigants whose only interest in a case is with the possible application of a ruling of law to their case are not thereby entitled to intervene. That discussion is dispositive of the *Clark* plaintiffs' motion as well and will not be repeated here.

Quite apart from its lack of merit, the motion exemplifies the litigation realities which make recognition of absolute Presidential immunity so important. Its

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[1] Even this aspect of the motion is inaccurate. In the district court, the *Clark* plaintiffs have never been prevented from taking full discovery against most of the named defendants. Only Mr. Nixon and the defendants in criminal proceedings listed in the motion have been off limits to deposition discovery. The *Clark* plaintiffs' failure to take a single deposition under these circumstances is hardly attributable to Mr. Nixon.

intemperate allegations, including charges of "deliberate fraud" levelled at members of the Bar of this Court, are as easily made in a complaint as in a motion. Absent a threshold defense like absolute immunity, such allegations trigger an expensive, time-consuming and burdensome process of litigation. Indeed, the *Clark* plaintiffs' eagerness for unbounded discovery in their case is manifest, and the litigation they contemplate would obviously be burdensome in the extreme. Their central allegation is that "hundreds of government officials were involved in the authorization, effectuation and subsequent cover-up of the acts committed against the *Clark* plaintiffs." Motion, p. 3. Denial of absolute Presidential immunity would truly be "a signal to the sitting President and other high government officials that they may [not] proceed with any action . . . without fear of civil litigation" of the sort the *Clark* plaintiffs envision. Motion, p. 9.

CONCLUSION

The Motion of Judith Clark, Dana Biberman, Natalee Rosenstein, Eve Rosahn and Jane Spielman to Intervene and for Other Relief should be denied.

Respectfully submitted,

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Nos. 79-1738 and 80-945

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v.

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BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF PETITIONERS HARLOW AND BUTTERFIELD TO THE MOTION OF JUDITH CLARK *ET AL.* TO INTERVENE AND FOR OTHER RELIEF

ELLIOT L. RICHARDSON
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September 25, 1981

For the second time in as many months, another group of plaintiffs, faced with an immunity defense in the lower federal courts, has sought to intervene in this case. Like the plaintiffs in *Halperin* v. *Kissinger,* 452 U. S.—(June 22, 1981), the plaintiffs in *Clark* v. *United States,* 78 Civ. 2244 (S.D.N.Y.), urge this Court either to dismiss this case or to permit them to air their views on the merits. Both Halperins' and Clark's motions grow out of cases involving similar factual allegations—that President Nixon was in some way responsible for allegedly injurious and illegal wiretapping. Both motions are based on the same faulty legal reasoning—that this case is now moot and that the possible precedential impact of the case confers some "interest" upon these other plaintiffs entitling them to intervene here. This case is vigorously disputed by all parties and is in no way moot, and the *Clark* plaintiffs have as little right to intervene here as do the plaintiffs in *Halperin.* Clark's motion has no merit and should be denied.

I.

The *Clark* plaintiffs ask this Court to dismiss the writs of *certiorari* in *Nixon* v. *Fitzgerald,* No. 79-1738, and *Harlow and Butterfield* v. *Fitzgerald,* No. 80-945, as having been improvidently granted. Since both cases were consolidated by this Court, Clark's motion is nominally directed at all parties in the consolidated case. However, the real target of the motion is not Harlow and Butterfield, but rather President Nixon. The *Clark* plaintiffs simply seek to shift the forum of their complaint against the former President from the district court to this Court. Because President Nixon is also a co-defendant in the *Clark* litigation, what the plaintiffs in that case obviously fear is a ruling by this Court upholding Presidential immunity. They seek dismissal of the *Fitzgerald* case on the ground that President Nixon's agreement with Fitzgerald renders the case moot. Moreover, they claim that the alleged failure to disclose

the agreement constitutes a "deliberate fraud."* Both of these arguments have already been persuasively rebutted in President Nixon's Response to the Halperins' Motion.

However, as discussed in their Response to the Halperins' Motion (August 27, 1981), petitioners Harlow and Butterfield respectfully urge this Court, if it decides to dismiss President Nixon's case, to retain their case nevertheless and to decide the important and recurring issues of official immunity squarely presented by it.

II.

The *Clark* plaintiffs also seek to become a party in this case so that they may present their views on the merits of these important issues. Like the Halperins, they will not be bound by a judgment in this case, nor do they have any concrete interest that would be "impaired" or "impeded" by any outcome of this case. *See* Fed. R. Civ. P. 24(a). Instead, they assert a novel basis for intervention: a ruling by this Court on the immunity issues in this case might constitute precedent adverse to them in their district court litigation. Surely the fact that the district court would be obligated to follow a decision of a higher court cannot possibly bestow on litigants in the lower court a legally sufficient "interest" entitling them to intervene in a case in the higher court. Yet this is precisely the rationale—and indeed the only rationale—advanced by the *Clark* plaintiffs.

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* The *Clark* plaintiffs go so far as to make the irresponsible and disingenuous suggestion that Harlow and Butterfield themselves participated in the alleged "deliberate fraud." Clark Motion at 10-11. This is utterly without foundation and simply not true. As detailed in President Nixon's Response to the Halperins' Motion, the substance of the Fitzgerald agreement was disclosed in papers filed with this Court (and so a matter of public record) on June 10, 1980, six months before Harlow and Butterfield retained their present counsel and filed their own *certiorari* petition. Since the attorneys for Fitzgerald and the former President had agreed to keep the specific details of the agreement confidential, Harlow and Butterfield themselves did not find out the full nature of the agreement until its disclosure last month in connection with the Halperins' motion.

The *Clark* plaintiffs will have ample opportunity to distinguish the facts of the present case from their own in the courts below (and even seek *certiorari* in this Court) if it should prove necessary to do so. They have not suggested any reason why any position they might take in opposing a grant of official immunity here would not be adequately presented by respondent Fitzgerald. In any event, if they still want their views to be heard now in this case, they may move for leave to file an *amicus* brief.

CONCLUSION

The motion by the *Clark* plaintiffs is totally devoid of merit. Petitioners Harlow and Butterfield respectfully ask that it be denied, and that this Court decide the questions raised in *Harlow and Butterfield* v. *Fitzgerald*, No. 80-945.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER RICHARD NIXON

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QUESTIONS PRESENTED

1. Whether a President is absolutely immune from personal liability in civil damages for his actions (or failures to act) as President.

2. Whether an order by a district court denying a President's defense of absolute immunity from civil damages is immediately appealable as a collateral order.

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ON WRITS OF CERTIORARI TO THE
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DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER RICHARD NIXON

OPINIONS BELOW

The district court's order of March 26, 1980, denying Petitioner Nixon's motion for summary judgment based on absolute Presidential immunity (Nixon Pet. App. A, 1a-5a), is not officially reported.[1] The order of the

[1]The forms used for record citations in this brief are as follows: to the appendices to Mr. Nixon's Petition for Certiorari, "Nixon

[footnote continued]

court of appeals granting Respondent's motion to dismiss Petitioner Nixon's appeal from the district court's order (Nixon Pet. App. D, 35a-36a) is not yet officially reported.

JURISDICTION

The district court entered its order denying Petitioner Nixon's motion for summary judgment on the grounds, *inter alia*, of absolute immunity from civil damage liability (Nixon Pet. App. 1a-5a) on March 26, 1980. The judgment of the court of appeals dismissing Petitioner Nixon's timely appeal from this order (Nixon Pet. App. D, 35a-36a) was filed on April 30, 1980. Mr. Nixon's Petition for a Writ of Certiorari was filed on May 2, 1980. By order dated June 22, 1981, this Court granted the Petition filed on behalf of former President Nixon and the Petition for a Writ of Certiorari filed by Petitioners Harlow and Butterfield, and consolidated the cases for briefing and argument.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals to review the order denying Petitioner Nixon's absolute

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Pet. App. ___"; to appendices to the Petition for Certiorari filed by Petitioners Harlow and Butterfield, "Harlow Pet. App. ___"; to the Joint Appendix, "JA ___"; to transcripts of depositions "[Deponent] Dep. (R. ___) ___"; to plaintiff's and defendants' exhibits to depositions, "PX ___" and "DX ___" (followed by a further citation to the deposition with which they are lodged and the pages at which they are identified or discussed); and to other record materials "R. _____." The depositions of Mr. Nixon, H. R. Haldeman, and Robert Seamans are in separately-paginated volumes. Citations to these depositions include volume numbers followed by page numbers. Citations in the form "R. ___" refer to documents which are listed and numbered in the district court docket entries reprinted in the Joint Appendix (JA 1a-53a).

immunity defense rested on 28 U.S.C. § 1291, which authorizes appeals of such "collateral orders." *See* pp. 19-21, *infra.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Other pertinent Constitutional and statutory provisions include the First Amendment to the United States Constitution, 18 U.S.C. § 1505, and 5 U.S.C. § 7211. They are reproduced in Nixon Pet. App. B, pp. 11a-12a.

STATEMENT

1. *Introduction And Overview*

This case raises an issue of paramount importance to our nation's past, present and future Chief Executives, as well as the people whom they serve: whether a President can be held liable in civil damages for his actions in office. In this civil action seeking compensatory and punitive damages, the district court denied a motion by Petitioner Richard Nixon for summary judgment based on absolute Presidential immunity, and the court of appeals dismissed his appeal from that order.

The merits of the case revolve around the Respondent's claim that he was the victim of a conspiracy, allegedly

spanning several Administrations and involving as many as seventeen individuals, to punish him for controversial testimony before a Congressional committee on cost overruns on the C-5A transport plane. According to the Respondent, civilian Air Force cost analyst A. Ernest Fitzgerald, the conspiracy began among Air Force officials immediately following his testimony in late 1968, and was responsible for his allegedly retaliatory termination, under the guise of a reorganization, in late 1969. President Nixon, who took office in January 1969, was alleged to have joined the conspiracy because of his supposed unhappiness with Fitzgerald's criticism of defense spending and to have approved his termination, either before or after the fact.

Throughout extended litigation on Fitzgerald's allegations, officials of the Department of Defense vigorously denied that Fitzgerald's termination was motivated by his Congressional testimony, and their position was credited by the Civil Service Commission in an administrative proceeding initiated by Fitzgerald to review the termination.[2] Likewise, Mr. Nixon has disavowed any role in Fitzgerald's loss of his job and other problems with the Defense Department; these denials are buttressed by his documented efforts to assist Fitzgerald to obtain employment within the White House Office itself at the very time the former President is alleged to have been engaged in efforts to punish him.

In the district court, the dispute on the merits between Fitzgerald and former President Nixon focused in particular on statements Mr. Nixon made, some three years after the fact, in a Presidential press conference and in several

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[2]JA 60a-89a.

brief tape-recorded conversations with White House advisors. Fitzgerald's position is that the former President's public statement, in which he declared himself responsible for Fitzgerald's termination, was a truthful admission, notwithstanding its prompt retraction. Mr. Nixon's position, borne out by his recorded conversations with his aides, is that during the press conference he confused the Fitzgerald matter, then three years in the past, with a more recent dispute involving another Defense Department employee, and that the prompt retraction stated the true facts.

Of course, in the context of the issues before this Court, disputes on the merits of Fitzgerald's claims are only tangentially relevant. If, as we demonstrate, Presidents are absolutely immune from civil damage liability for their official actions, that immunity would be available on any conceivable understanding of the facts. Accordingly, the remainder of this Statement is limited to a brief review of the facts and lengthy procedural history of the case, with a focus on former President Nixon's actions.

2. *Fitzgerald's Congressional Testimony On The C-5A*

In 1968, the last full year of President Johnson's term, Fitzgerald was a civilian cost analyst in the Department of the Air Force. After several private conversations with a member of the staff of Congress' Joint Economic Committee (Kaufman Dep. (R. 472) 27), Fitzgerald was invited to give public testimony before a subcommittee chaired by Senator William Proxmire. On November 13, 1968, Fitzgerald appeared and testified that cost overruns on the C-5A transport plane could approximate $2 billion. *Hearings Before the Subcommittee on Econ-*

omy in Government of the Joint Economic Committee, 90th Cong., 2d Sess., 200 (1968).

3. *Alleged Retaliation By The Air Force*

Fitzgerald claims that his relationships with Defense Department officials in the Johnson Administration deteriorated in the months following his testimony and that he was the subject of various retaliatory actions. He alleges that these actions included the revocation of his tenure (R. 28 (Affidavit of A. Ernest Fitzgerald), ¶ 35), critical comments from superiors (*id.* at ¶¶ 40, 42), cutbacks in his responsibilities (*id.* at ¶¶ 42-45), and strained relations generally with his colleagues (*id.* at ¶ 40).[3]

4. *The Abolition Of Fitzgerald's Job*

President Nixon's appointee as Secretary of the Air Force, Robert Seamans, Jr., took office on February 15, 1969. Seamans Dep. (R. 333-35) 1-122. According to Fitzgerald, Air Force retaliation against him continued under Secretary Seamans' leadership. R. 28 (Affidavit of A. Ernest Fitzgerald), ¶¶ 45-47, 50-59.

In May 1969, Assistant Secretary Thomas Nielsen, a holdover appointee and Fitzgerald's immediate superior,

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[3]The Civil Service Commission noted that friction had arisen between Fitzgerald and the Department of the Air Force, but attributed it to a cause other than retaliation. The CSC found that what Fitzgerald (and a front-page story in the *Washington Post*) had described as the revocation of his tenure had in fact been the *bona fide* correction of an administrative error and that Fitzgerald had never had any tenure which could be revoked. Air Force officials concluded that Fitzgerald had been "directly or indirectly responsible for" unfair and inaccurate press accounts of this incident and had planted the story "for the purpose of placing the Air Force in a bad light." (JA 74a, 82a).

proposed a reorganization that would have eliminated Fitzgerald's position. *See* Seamans Dep. (R. 333-35) 2-76 to -80. On May 9, Seamans called Petitioner Bryce Harlow, a member of the White House staff responsible for relations with Congress, seeking an assessment of what the reaction on the Hill would be to a reorganization that resulted in the abolition of Fitzgerald's job. *Id.* at 2-112, 2-114 to -115, 2-134, 3-55 to -56, 3-199 to -200. Harlow's executive assistant, Lamar Alexander, called back later and said that it would not be a good time to take such an action. *Id.* at 2-117, 2-120. Seamans decided not to implement Nielsen's plan. *Id.* at 3-234.

Some six months later, in the context of substantial Defense Department-wide reductions in defense spending and civilian employees, Nielsen's replacement, Spencer Schedler, proposed a reorganization of his office which included, among other things, the abolition of Fitzgerald's job. JA 159a.[4] On November 3, 1969, Secretary Seamans signed the order abolishing Fitzgerald's position effective January 5, 1970. JA 158a-59a. Seamans testified unequivocally that he was not directed or advised to take this action by then President Nixon or any person acting on his behalf. JA 159a-60a, 161a; *see* Laird Dep. (R. 455) 14-15. Seamans also denied that his decision had been motivated by Fitzgerald's C-5A testimony. JA 160a, 168a.

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[4]During the interim, Fitzgerald met with Secretary of Defense Melvin Laird to consider the possibility of placing Fitzgerald in a different job in the Defense Department. Laird Dep. (R. 455) 7-9, 10-11, 97-98. However, Laird's personal assessment was that Fitzgerald was not interested in a job in the Department of Defense. *Id.* at 10-11, 79-80.

5. *Opposition By Some Members Of The White House Staff To The Air Force Decision*

On November 4, Fitzgerald's termination was announced to the press, and it generated a wave of critical publicity. *See, e.g.*, PX 186, 187, 188 (to R. 378). As a result, one member of the White House staff, Clark Mollenhoff, telephoned Seamans and met with Schedler and his military aide to determine the basis for the Air Force's action. Seamans Dep. (R. 333-35) 3-14 to -15; Mollenhoff Dep. (R. 331) 79-86. Following these inquiries, Mollenhoff prepared a memorandum addressed to President Nixon which described the Fitzgerald matter as a public relations problem. JA 259a-60a.[5] Mollenhoff proposed, as one possible solution to the problem of press criticism, that the White House "arrange to move Mr. Fitzgerald to some other job in the Defense Department * * *." *Id.*

In early December 1969, Secretary Seamans became concerned that the White House was going to require Fitzgerald's reinstatement. JA 156a. Consequently, he told Mollenhoff by phone on December 5 that he was strongly opposed to White House interference with the reorganization and that any change in the reorganization would be "over [his] dead body." JA 156a. Seamans and Deputy Secretary of Defense David Packard also expressed this concern to Bryce Harlow. JA 157a-58a; 227a; *see* Harlow Dep. (R. 392) 116.

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[5]Discovery disclosed that this memorandum was routinely referred to another member of the White House staff for further comment, and did not reach President Nixon. Krogh Dep. (R. 468) 13. *See also* Harlow Dep. (R. 392) 177.

6. *President Nixon's December 8, 1969, Press Conference*

President Nixon became aware of the dispute within his Administration over the Fitzgerald matter when he reviewed a "briefing book" (of the sort routinely prepared prior to press conferences) containing conflicting proposals on how he should respond to anticipated questions regarding Fitzgerald at a press conference scheduled for December 8, 1969. JA 130a-31a. A "Q & A" drafted by White House Aide Patrick Buchanan on the basis of materials supplied by the Department of Defense (JA 266a; *see* JA 93a) recommended that the President deny that Fitzgerald had been terminated as a retaliatory step but indicate that Fitzgerald would be working "elsewhere" in the future. By contrast, a memorandum by Clark Mollenhoff (JA 270a-71a; *see* JA 96a-97a) and Buchanan's personal recommendation (JA 267a-69a; *see* JA 93a-95a) agreed that the public impression that Fitzgerald's termination had been retaliatory was erroneous, but advocated, from a public relations standpoint, reemploying Fitzgerald in the Defense Department in a different job. *See* JA 90a-92a.

At the press conference on December 8, President Nixon was asked a rambling question referring in part to the Fitzgerald matter. JA 228a. Conscious of the dispute between Defense Department officials and certain members of his staff who were advocating Fitzgerald's reinstatement (JA 130a-31a, 135a), the President responded by indicating that he would look into the matter. JA 228a.

7. *President Nixon's Efforts To Assist Fitzgerald*

The next day, in order to honor his promise at the press conference and to implement the substance of Mollenhoff's proposal while accommodating the Defense Department's opposition to Fitzgerald's reinstatement, President Nixon told H. R. Haldeman to do what he could to find Fitzgerald a position in the Bureau of the Budget. JA 275a, 289a, 109a-11a, 137a, 139a, 140a-41a. President Nixon later raised the matter himself in a personal meeting with the Bureau's Director, Robert Mayo. JA 141a, 125a-26a, 105a-06a. However, both Mayo and his deputy, James Schlesinger, resisted Fitzgerald's placement in their agency because of an absence of available upper-grade positions and their suspicion that Fitzgerald had passed information out-of-channels to a Congressional committee. JA 146a-48a, 126a. In the face of this opposition, President Nixon ceased his efforts to place Fitzgerald in the Bureau of the Budget. JA 106a, 276a-77a, 126a-27a.

In mid-January, President Nixon read an account in the White House news summary of a *Chicago Tribune* editorial critical of his Administration's handling of the Fitzgerald matter. JA 273a, 131a-32a. The President noted in the margin of this summary, "H [Haldeman]—I wonder if we fumbled this one—check it out again." *Id.* The President's request was referred by his staff to Henry Kissinger, who as the president's National Security Advisor was responsible for liaison with the Department of Defense. JA 233a-34a. Kissinger responded that no further action was necessary. JA 290a-91a; *see* R. 375, ¶ 2; R. 436, ¶ 2.

8. *Secretary Seamans' Invocation Of Executive Privilege And The President's 1973 Press Conference*

Following his termination, Fitzgerald initiated an administrative proceeding before the Civil Service Commission seeking reinstatement and backpay. On January 30, 1973, Secretary Seamans testified in that proceeding that he had "never received any instruction" from the White House regarding the Fitzgerald matter. R. 255, Attachment I, p. 494. However, he refused to answer further questions regarding his communications with members of the White House staff. *Id.* at 493-501.

At a Presidential press conference the next day, Clark Mollenhoff, who had returned to his career as a journalist, asked President Nixon a series of questions about the executive privilege issues arising from Seamans' action. JA 183a-85a. Mollenhoff's final question sought information on "the specific situation with regard to Fitzgerald." Mr. Nixon replied (*id.*):

> Let me explain. I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me.
>
> No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.

After the press conference, President Nixon discussed the matter of executive privilege, an issue of then-current importance in light of the Ervin Committee hearings, in several recorded conversations with his aides. Nixon Pet. App. C, pp. 13a-21a. In the midst of a conversation

with John Ehrlichman, President Nixon realized that during his press conference he had confused Fitzgerald with another civilian in the Defense Department. *Id.* at 17a; JA 132a-34a. After confirming the error (Nixon Pet. App. C, p. 18a), President Nixon directed his press secretary to issue a correction (Nixon Dep. I (R. 378) 130-32, 267). The next day, Ron Ziegler stated to the press in pertinent part (JA 196a):[6]

> [The President] indicated to me after reading the transcript of yesterday's press conference that he was mistaken in his reference to Mr. Fitzgerald and the fact of the matter is that the President did not, as indicated yesterday in the press conference, have put before him the decision regarding Mr. Fitzgerald.

9. *The CSC Decision*

On September 18, 1973, the Civil Service Commission, ruling on Fitzgerald's appeal from the decision abolishing his job, found that he had not been the subject of retaliation for his Congressional testimony. JA 81a. However, the CSC also concluded that the abolition of Fitzgerald's job "resulted from reasons purely personal to" him and that this was improper because the statute governing reductions in force directs that they be implemented without regard to the individuals holding the affected positions. JA 86a-87a. The CSC directed that Fitzgerald be reinstated to his old job, or an equivalent position, with backpay. JA 87a-88a.

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[6]President Nixon's last contact with the Fitzgerald matter occurred in late February and March 1973 when he directed Ron Ziegler and John Dean to cooperate with Mollenhoff's efforts to settle Fitzgerald's then-pending Civil Service proceedings. Nixon Pet. App. C, p. 25a-32a; JA 225a-26a.

10. *Fitzgerald's Complaints In This Action*

Unsatisfied with reinstatement and backpay, Fitzgerald filed the original complaint in this action, seeking over $3,500,000 in compensatory and punitive damages from eight Air Force and Defense Department officials and Petitioner Alexander Butterfield. R. 1. However, the district court granted a motion to dismiss based on the District of Columbia's three-year statute of limitations. 384 F. Supp. 688 (1974). On appeal, the court of appeals affirmed as to all of the defendants from the Department of Defense, but reversed as to Butterfield, holding that Fitzgerald had no reason to know prior to 1973 of any activity by Butterfield. 553 F.2d 220 (1977).

Frustrated in his attempts to sue members of the Defense Department, Fitzgerald shifted his attack to the White House. Some eight and a half years after the abolition of his job, he filed a Second Amended Complaint and added former President Nixon as a defendant. R. 140. The Complaint alleged generally that Petitioners Nixon, Harlow, and Butterfield and various unnamed others had conspired for nearly a decade to punish Fitzgerald for his C-5A testimony.

On this basis, the Second Amended Complaint asserted eight causes of action, founded on constitutional provisions, several federal statutes, and the common law of the District of Columbia. *Id.* at ¶¶ 44-59. By the end of pretrial proceedings, three causes of action remained, based on the First Amendment and two federal statutes, 18 U.S.C. § 1505 and 5 U.S.C. § 7211. Respondent's Supplemental Brief (No. 79-1738) (filed May 14, 1980); *see* Nixon Pet. App. B, pp. 11a-12a. The Second Amended Complaint requested $3,500,000 "or more" in compensatory and punitive damages. R. 140, p. 21.

11. *Pretrial Proceedings*

Former President Nixon responded initially to the Second Amended Complaint with a motion to dismiss or, in the alternative, for summary judgment on the grounds, *inter alia*, of absolute immunity. *See* R. 163. By order filed on April 27, 1979, the district court deferred decision on the issue of absolute immunity and permitted deposition discovery to begin. JA 56a-57a.

Mr. Nixon, whose defense was then essentially being conducted by a single Department of Justice lawyer who also represented both co-defendants and government employee witnesses with potentially divergent interests, retained private counsel to represent him in subsequent proceedings in the district court. Following a year of extensive liability discovery, former President Nixon renewed his motion for summary judgment based on absolute Presidential immunity. R. 445, 447 (p. 17 n.13). Numerous other grounds for total and partial summary judgment were also advanced. R. 445-46, 448-49.

12. *The Decision Of The District Court*

In a March 11, 1980, order, the district court denied the motion for summary judgment based on absolute immunity, stating (Nixon Pet. App. A, p. 2a):

> Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979).

The court also held that "genuine issues of fact" precluded summary judgment on the issues of qualified immunity and the statute of limitations and reaffirmed

its prior rulings that Fitzgerald could assert rights of action under the First Amendment, 5 U.S.C. § 7211, 18 U.S.C. § 1505, and District of Columbia common law. *Id.* at 1a-10a.

13. *Proceedings In The Court Of Appeals*

On April 11, 1980, former President Nixon filed a notice of appeal from the denial of absolute immunity. R. 518. Fitzgerald moved to dismiss for lack of jurisdiction, or, in the alternative, for summary affirmance. On April 30, 1980, in a brief *per curiam* order, the court of appeals granted the motion to dismiss. Nixon Pet. App. D, pp. 35a-36a.[7]

SUMMARY OF ARGUMENT

The district court's order denying former President Nixon's motion for summary judgment based on absolute Presidential immunity is an immediately appealable "collateral order." That ruling conclusively determined the question of absolute immunity, an issue completely separate from the merits of this action and effectively unreviewable upon an appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Abney v. United States*, 431 U.S. 651, 658-59 (1977); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979). Accordingly, the merits of absolute Presidential immunity are properly before this Court.

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[7]After Mr. Nixon's Petition and the Brief in Opposition had been filed in this Court, an agreement was concluded setting maximum and minimum limits for potential liability in the case. Appendix to Respondent's Opposition to Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief (filed August 24, 1981). A full discussion of this agreement is contained in Petitioner Nixon's Response to Halperins' Motion to Intervene and for Other Relief (filed August 24, 1981).

Prior decisions of this Court have extended absolute immunity to various categories of public officials, including state and federal judges, *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), prosecutors, *Imbler v. Pachtman*, 424 U.S. 409 (1976), state legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and some administrative officials, *Butz v. Economou*, 438 U.S. 478, 508-17 (1978). In the context of each such category of officials, the Court has undertaken a considered inquiry into (1) "the immunity historically accorded the relevant official at common law" and (2) "the interests behind it." *Butz v. Economou, supra*, 438 U.S. at 508. These criteria compel recognition of absolute immunity for Presidents of the United States acting in their official capacity.

Absolute immunity from civil damage liability has been "historically accorded" the President. During extensive original debates on the powers of and restraints on the Presidency, no one suggested that Presidents were to be accountable in civil damages for their official actions. Rather, the Framers chose to restrain the President through a combination of political checks and balances, public accountability, and, in extreme cases, impeachment. *The Federalist* No. 77 (Alexander Hamilton) at 564 (Franklin Library ed. 1980). Early commentators recognized the President's immunity from civil liability. III J. Story, *Commentaries on the Constitution of the United States*, § 1563, at 418-19 (1833 ed.); W. Maclay, *Sketches of Debate in the First Senate of the United States*, 151-52 (Harris ed. 1880).

The virtual absence of suits against Presidents for nearly two hundred years is equally compelling proof of the immunity from civil damage liability "historically accorded" those officials. The court of appeals' decision in *Halperin v. Kissinger*, 606 F.2d 1192, 1210-13 (D.C.

Cir. 1979), *aff'd by an equally divided Court*, No. 79-880 (June 22, 1981), which held that Presidents are entitled only to a qualified "good faith" immunity, represents a sharp departure from a well-established historical understanding.

The "interests behind" absolute Presidential immunity fully justify its continued recognition. As in the case of legislative, judicial, and prosecutorial officials who have been granted absolute immunity, the President must be given this protection to safeguard the public's interest in the "vigorous and fearless performance" of Presidential duties. *Imbler v. Pachtman, supra*, 424 U.S. at 427. *See, e.g., Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950). Moreover, in the case of the President, the historic policy grounds for absolute immunity are given additional force by the principle of separation of powers.

Examining the justification for absolute Presidential immunity in more detail, the President's duties and responsibilities are unique from both Constitutional and practical standpoints. The President is vested with the "executive Power," is responsible for the nation's relationships with foreign states, and performs a host of functions whose importance has grown with this nation's economic and social integration and its emergence as a world power. The public's interest in the "vigorous and fearless" performance of these duties is very weighty.

At the same time, the President's visibility makes him particularly susceptible to suit by persons who perceive themselves as his victims and by others with political motives. The threat of such suits would have the same negative influence on Presidents that it is properly perceived to have on other officials entitled to absolute immunity. Such suits would impose unrecoupable costs of litigation on Presidents, in terms of both time and

money. Time spent by a President in office on the defense of civil actions would be diverted from public business. Intrusive discovery now customary in civil actions, *see Herbert v. Lando*, 441 U.S. 153, 176 & n.26 (1979), would have a particularly severe impact on the President and his high-level advisors, whose involvement in any suit against a President would be unavoidable. Finally, the threat of adverse judgments arising out of Presidential decisions would be the same deterrent to the "vigorous and fearless" performance of Presidential duties that it is in the case of other officials.

Civil damage liability is not necessary to compensate the occasional plaintiff with a meritorious claim against a President or to deter unlawful conduct. An array of administrative and Federal Tort Claims Act remedies is potentially available to plaintiffs injured by government action for which the President is responsible. Checks and balances, accountability to the electorate, public opinion, and the possibility of impeachment were the means chosen by the Framers to restrain the President, and they remain fully sufficient for that function today.

Qualified, "good faith," immunity (*e.g., Wood v. Strickland*, 420 U.S. 308, 322 (1975)), is not an adequate safeguard of the public interest underlying Presidential immunity. It provides no protection at the pleading stage, entails unlimited discovery into the merits of allegations against a President and his thought processes, and offers no realistic prospect of a disposition short of trial. *See Doe v. McMillan*, 412 U.S. 306, 339 (1973) (Rehnquist, J., concurring and dissenting); *Tenney v. Brandhove, supra*, 341 U.S. at 377.

Absolute Presidential immunity is also justified by the Constitutional principle of separation of powers. If Presidents are denied absolute immunity, their motives and thought processes will routinely be subject to judicial

inquiry and oversight and the Constitutional privilege for their communications with advisors will be undermined. *See United States v. Nixon*, 418 U.S. 683 (1974). In the analogous context of the Speech or Debate Clause, this Court has recognized the threat posed by such judicial action on the integrity of the coequal branches of government. *United States v. Johnson*, 383 U.S. 169, 178-79 (1966). The same concern justifies absolute Presidential immunity from civil damage liability. Absent a clear mandate, the judiciary should not jeopardize the integrity of the Executive and abrogate the historical immunity of the President.

ARGUMENT

I.

THE DISTRICT COURT'S RULING ON FORMER PRESIDENT NIXON'S ABSOLUTE IMMUNITY DEFENSE WAS AN APPEALABLE "FINAL DECISION"

This Court's cases establish that, under 28 U.S.C. § 1291 (*see* p. 3, *supra*), a small class of "collateral orders" issued by district courts are immediately appealable to the courts of appeals. To fall within this category, an order must

> conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). *Accord, Abney v. United States*, 431 U.S. 651, 658 (1977); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979). The district court's order denying former President Nixon's motion for summary judgment on the ground of absolute immunity clearly meets each of these three criteria:

First, the district court's rejection of absolute Presidential immunity was by its terms final, unqualified and thus "conclusive" for purposes of the collateral order doctrine (Nixon Pet. App. A, p. 2a):

> Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield.

See Helstoski v. Meanor, supra, 442 U.S. at 506; *Abney v. United States, supra,* 431 U.S. at 659.

Second, the issue of absolute Presidential immunity in this case is both "important," because it implicates the relationship between two Branches of the federal government and the public's interest in vigorous Presidential leadership (*see* pp. 44-48, *infra*) and "completely separate from the merits of the action." Former President Nixon's absolute immunity defense can be determined here without regard to the merits of Fitzgerald's claim. *See Abney v. United States, supra,* 431 U.S. at 659-60; *Helstoski v. Meanor, supra,* 442 U.S. at 506-08. Indeed, the defense of absolute immunity could not serve its purpose if its determination depended on the merits of the claim to which it is interposed. *See* pp. 48-49, *infra.*

Third, absolute immunity, like the defense of double jeopardy or the protection conferred by the Speech or Debate Clause, is designed to "protect [its beneficiaries] 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Helstoski v. Meanor, supra,* 442 U.S. at 508, *quoting Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967). *See Abney v. United States, supra,* 431 U.S. at 660-61; *Forsyth v. Kleindienst,* 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth,* 49 U.S.L.W. 3969 (U.S. June 29, 1981) (No. 79-1120). Because such rights are vindicated only if given effect at the threshold of litigation, delayed review is "ineffective."

The court of appeals gave no reason whatever for its refusal to review the district court's denial of former President Nixon's absolute immunity defense. Its ruling cannot be squared with this Court's decisions in *Abney* and *Helstoski*, which held that orders indistinguishable in any material sense from that of the district court here were immediately appealable. The court of appeals' ruling is also at odds with the decision of the only other court of appeals to have considered the same issue. *Forsyth v. Kleindienst, supra.*[8]

Fitzgerald's claim in his Brief in Opposition (p. 2) that this case was not, within the meaning of 28 U.S.C. § 1254, "in" the court of appeals at the time Mr. Nixon's Petition was filed "because that court had granted respondent's motion to dismiss for lack of jurisdiction" is meritless. Acceptance of that unprecedented proposition would effectively insulate any ruling by a court of appeals denying the existence of appellate jurisdiction from all review by this Court. This Court has routinely reviewed such rulings. *E.g., Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

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[8]Indeed, the court of appeals' order is in apparent conflict even with its own decisions in *McSurely v. McClellan*, 521 F.2d 1024, 1030-33 (D.C. Cir. 1975), *aff'd in pertinent part en banc*, 553 F.2d 1277, 1283-84 n.18 (D.C. Cir. 1976), *cert. dismissed*, 438 U.S. 189 (1978); *Briggs v. Goodwin*, 569 F.2d 10, 59-60 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); and *Dellums v. Powell*, No. 80-1331 (D.C. Cir. July 24, 1981), slip op. at 4 & n.5.

The only assertion advanced by Fitzgerald in support of his motion to dismiss the appeal for lack of appellate jurisdiction was that the former President's absolute immunity defense was not "serious and unsettled" in light of *Halperin v. Kissinger, supra*, 606 F.2d 1192. This claim never had merit. But, in any event, the recent affirmance of *Halperin* by an equally divided Court and the grant of the writ in this case establish the serious and unsettled nature of Mr. Nixon's contentions.

II.

THE PRESIDENT HAS HISTORICALLY BEEN RECOGNIZED AS IMMUNE FROM CIVIL LIABILITY

This Court's prior decisions have extended absolute immunity to various categories of public officials, including judges, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Pierson v. Ray*, 386 U.S. 547 (1967), prosecutors, *Imbler v. Pachtman*, 424 U.S. 409 (1976), state legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and some lower level executive officials, *Butz v. Economou*, 438 U.S. 478, 508-17 (1978). In *Butz*, the Court described the two sources to which it has referred in determining the recurrent issue of absolute immunity (438 U.S. at 508):

> In each case, we have undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." [*quoting Imbler v. Pachtman, supra*, 424 U.S. at 421].

The nature of the immunity "historically accorded" the President is clear. When the office itself was being created and the Constitution ratified, the question of how to restrain the Chief Executive was given close consideration. It was never suggested that civil damage actions would be an appropriate restraint, and contemporaneous authorities expressed the understanding that the President was immune from suit. This understanding was so widely shared that, for nearly two hundred years, civil damage actions against Presidents arising out of their actions in office were exceedingly rare. This is surely an issue on which "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

A. The Original Understanding

The powers of and limitations on the Presidency were among the most important and controversial questions debated during the Constitutional Convention and the process of ratification.[9] After the authority of the King of England and the colonial governors was broken, the understandable reaction on the State and national level was to vest nearly total authority in the legislative branch. In the immediate post-revolutionary period, the systems of government of virtually every state and the Confederation took this form. C. Thach, *The Creation of the Presidency 1775-1789*, chs. 2-3 (1969 ed.). By 1787, however, the concept of sole control by the legislature had been discredited. Ineffective administration and legislative excesses generated pressure at the Constitutional Convention for a strong Executive independent of the Congress. *See id.* at 52, 74, 169.

At the same time, the delegates to the Convention were all too aware, from the recent colonial experience, of the dangers associated with uncontrolled executive authority. They were unwilling to trust the self-restraint of the President, and created a system vesting substantial power in the Presidency while at the same time subjecting the office to substantial restraints. All authorities support the conclusion that political checks and balances, public accountability, and, in extreme cases, impeachment were the exclusive means chosen to achieve this

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[9]The heat of the debate over this issue was reflected in Alexander Hamilton's complaint concerning criticism of the office of the Presidency (*The Federalist* No. 67 at 491 (Franklin Library ed. 1980)):

> There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is perhaps none, which has been inveighed against with less candor or criticized with less judgment.

goal. In the last of his essays on the Presidency, for instance, Hamilton summarized this Constitutional plan as follows (*The Federalist* No. 77 at 564 (Franklin Library ed. 1980)):

> The remaining enquiry is: does it [the Presidency] combine the requisites to safety in the republican sense—a due dependence on the people—a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances, the election of the president once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other; and to the forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones, which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the chief magistrate of the United States would by that plan be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?[10]

These were the means chosen to limit the recognized possibility of Presidential abuses. James Madison had urged that "some provision should be made for defending the Community against the incapacity, negligence, or perfidy of the chief Magistrate." II M. Farrand, *The Records of the Federal Convention of 1787*, 65 (1927

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[10]Essentially the same views were frequently expressed by James Wilson, later a Justice of this Court, whom at least one commentator (C. Thach, *supra*) has credited with the design of the Presidency. I *The Works of James Wilson*, 400 (Andrews ed. 1896); II *id.* at 45; II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 479-80 (1836).

ed.). There had also been agreement that the President should not be "above Justice" (*id.* at 65 (remarks of George Mason)), and that the Constitution should not reflect the principle "that the chief Magistrate could do [no] wrong" (*id.* at 66 (remarks of Eldridge Gerry)). Nevertheless, primary reliance was placed on the political process. For example, Rufus King argued that the President "would periodically be tried for his behavior by his electors, who would continue or discontinue him in trust according to the manner in which he discharged it." *Id.* at 67; *see id.* at 68. No one suggested that a President would be routinely subject to civil damage liability in state and federal courts for his actions in office.

The understanding that the President would be restrained by structural checks, accountability, and impeachments, but not by civil damage liability, was clear to contemporaneous commentators. Justice Story concluded (III J. Story, *Commentaries on the Constitution of the United States*, § 1563, at 418-19 (1833 ed.)):

> There are * * * incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.

Vice President John Adams and Senator Oliver Ellsworth of Connecticut (a member of the Constitutional Convention and later a Chief Justice of this Court) also concluded that no action could be instituted personally against the President, since that power would permit a single judge to "stop the whole machine of government." They added "[Y]ou could only impeach [the President], and no other process whatever lay against him." W. Maclay, *Sketches of Debate in the First Senate of the United States*, 151, 152 (Harris ed. 1880).

B. The Absence Of Civil Suits Against The President

Potential suitors drew one conclusion from these early authorities. For nearly two hundred years there were virtually no reported civil damage actions against a President.[11] This dearth of suits must be viewed as substantial evidence of the absolute immunity "historically accorded" the President. Indeed, when this Court had before it the question whether a President could be sued to restrain enforcement of an allegedly unconstitutional statute, heavy reliance was placed on the absence of any attempt in the prior eighty-five years to file such an action (*Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1875)):

> The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.[12]

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[11] Our research has revealed only one case prior to the 1970's in which a party sought civil damages from a President for his actions in office. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8, 411) (1811). This suit, which sought damages for an alleged trespass committed by a marshal acting at President Jefferson's orders, was dismissed for want of jurisdiction.

[12] The Court also stated (*id.*):

> It was admitted on the argument that the application now

[footnote continued]

The scarcity of civil damage actions against Presidents for a much longer period is still more indicative of "the general judgment of the profession that no such application should be entertained." This "general judgment" was, moreover, shared by members of this Court. For instance, in *Barr v. Matteo*, 360 U.S. 564, 583 (1959) (Warren, C.J., dissenting), former Chief Justice Warren (joined by former Justice Douglas) explained that the absolute immunity recognized in *Spalding v. Vilas*, 161 U.S. 483 (1896), "partakes of presidential immunity." *Cf. Doe v. McMillan*, 412 U.S. 306, 319 (1973) ("executive officers with discretionary functions * * * have been held absolutely immune regardless of their motive or good faith"). Finally, when a wave of civil damage actions was filed against President Nixon during a highly-volatile period of our history in which litigation was increasingly viewed as a means for resolving political disputes, the lower courts initially dismissed them on grounds of absolute immunity. *Reese v. Nixon*, 347 F. Supp. 314, 316-17 (C.D. Cal. 1972), *aff'd in pertinent part*, No. 72-3070 (9th Cir. May 3, 1974); *Bohmer v. Nixon*, Civ. No. 75-4-T (S.D. Cal. June 21, 1976); *Davis v. Nixon*, Civ. No. 73-1520-LTL(G) (C.D. Cal. June 18, 1974); *Fonda v. Nixon*, Civ. No. 73-2442-MML (C.D. Cal. May 23, 1974). (These unpublished opinions are reprinted in the Joint Appendix, pp. 302a-332a.

The decision of the D.C. Circuit in *Halperin v. Kissinger* thus represents a sharp break from an understanding held with apparent unanimity since the first days of the Republic. There had, of course, been many, many heated disputes over a President's authority and conduct in office. But, before *Halperin*, those suits were either kept out of the courts or were pursued in the courts in

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made to us is without a precedent; and this is of much weight against it.

the names of other parties. *E.g., Myers v. United States,* 272 U.S. 52 (1926); *Humphrey's Executor v. United States,* 295 U.S. 602 (1935); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

If the holding in *Halperin* becomes the law, such disputes and many others far more trivial will routinely be brought to state or federal court with a count seeking compensatory and punitive civil damages from the President in his personal capacity. *See National Treasury Employees Union v. Reagan,* No. 80-1294 (D.C. Cir. August 11, 1981). Indeed, the experience with equitable suits against Presidents is an indication of the likely consequences. The court of appeals' decision authorizing mandamus actions against a President in *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974), has spawned a number of such suits, *see e.g., Dickson v. Ford,* 521 F.2d 234 (5th Cir. 1975), *cert. denied,* 424 U.S. 954 (1976); *Mapco, Inc. v. Carter,* 573 F.2d 1268 (Temp. Em. Ct. App. 1978), *cert. denied,* 437 U.S. 904 (1978); *Daughtrey v. Carter,* 584 F.2d 1050 (D.C. Cir. 1978). The President has also been named as a defendant in a wave of suits brought by Congressmen. *Dole v. Carter,* 569 F.2d 1109 (10th Cir. 1977); *Edwards v. Carter,* 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied,* 436 U.S. 907 (1978); *Goldwater v. Carter,* 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated mem.,* 444 U.S. 996 (1979). There is no reason to believe that damage actions against a President, if approved by the Court, would follow a different course.

III.

ABSOLUTE PRESIDENTIAL IMMUNITY IS "ESSENTIAL FOR THE CONDUCT OF THE PUBLIC BUSINESS"

The second element of the analysis described in *Butz v. Economou, supra,* is an inquiry into "the interests behind" the immunity accorded an official. The classic

rationale for extending absolute immunity to an official has long been that this protection is necessary to vindicate the public's interest in effective government. Exposure to civil damage suits is properly understood to undermine that interest, both because the threat of ultimate liability would "prevent the vigorous and fearless performance" of the official's duties, *e.g.*, *Imbler v. Pachtman, supra,* 424 U.S. at 427, and because the litigation of civil damage claims diverts the official's energy and attention from the public business.

This rationale applies with particular force to the Presidency, is buttressed by the principle of separation of powers, and fully justifies the absolute immunity that has been historically extended to the holders of that office. Because the President's responsibilities are immense and national in scope, the public's interest in the "fearless" performance of his duties is unparalleled. At the same time, the President's visibility poses a special threat to that interest; the office is a likely focus of dissatisfaction, readily transformed into litigation, on the part of persons who perceive themselves as victims of the many difficult choices that a President and his Administration must make daily. Requiring a President in office to respond to civil damage suits in the interest of vindicating rare meritorious claims will divert the Chief Executive's attention from urgent public business. Moreover, even if suits could be postponed until after Presidents have left office, an alternative that would prejudice them, immunity would still be justified as a means of assuring that Presidents will not function under a constant threat, resulting from both the costs of litigation and the possibility of ultimate liability, aimed at their personal estates. A dependable, threshold defense is necessary to safeguard the public's interest in the performance of Presidential duties, and qualified immunity cannot perform this function in the context of the Presidency.

A. The Public's Interest In The "Vigorous And Fearless" Performance Of Presidential Duties

From both a theoretical and a practical perspective, the Presidency is unique in its authority and responsibilities. Alone among all officials in the Executive Branch, the President derives authority directly from the Constitution; only that office is vested with the "executive Power," U.S. Const., Art. II, § 1. In the area of international relations, moreover, the President exercises "the very delicate, plenary and exclusive power * * * as the sole organ of the federal government." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), *quoted with approval in Dames & Moore v. Regan*, 49 U.S.L.W. 4969, 4971 (U.S. June 24, 1981) (No. 80-2078). The Constitution also confers a number of important enumerated powers on the President. He is "Commander in Chief" of the armed forces and has the power to grant pardons, "to make Treaties" with the advice and consent of the Senate, to appoint ambassadors, Judges and various "Officers of the United States," U.S. Const., Art. II, § 2, and to veto legislation, *id.*, Art. I, § 7.

The Constitution's drafters intended, by conferring these powers, to create a strong Executive. *See generally* C. Thach, *The Creation of the Presidency 1775-1789*, chs. 1-4 (1923). The Presidency has assumed even greater importance in modern times. Through legislation, Congress has delegated a host of functions to the President, or to officials in agencies functioning under his supervision and control. As a result, the President now directs an enormous federal bureaucracy that fundamentally affects every citizen. The importance of the President's oversight of the defense establishment and his decisions as Commander-in-Chief has also grown enormously as this country has attained the status—and

responsibilities—of a world power. Since at least the Great Depression, he has also been held responsible by the public for the oversight of the national economy. And, because of his position as a nationally-elected official, the President is also expected to play a role in the formulation of legislation and to counteract the divergence of the points of view held by individual members of Congress.

The importance of the President's functions makes the public's interest in the "vigorous and fearless performance" of those duties all the more weighty. It does not downplay the significance (individually or collectively) of judges, prosecutors, and legislators in this country to suggest that if civil damage liability has the same negative effect on Presidents that it is universally understood to have on these other officials, the consequences for the public of exposing Presidents to civil suits will be extraordinarily severe. The magnitude of the public's interest is the critical "interest behind" absolute Presidential immunity. *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.), *cert. denied,* 339 U.S. 949 (1950).

B. The President's Susceptibility To Civil Suit

The very importance of the Presidency also magnifies the threat posed by civil suits to the public's interest in the performance of responsibilities entrusted to the office. Like prosecutors and judges, Presidents excite strong feelings in a large number of persons who perceive themselves as the victims of Presidential decisions. *Imbler v. Pachtman, supra,* 424 U.S. at 425 (suits against prosecutors "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate"); *see Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 348. Each of these individuals is a potential plaintiff.

The President's position at the head of the government makes him uniquely visible. As President Truman's famous aphorism, "the buck stops here," suggests, it is the President's function to decide personally the most difficult, controversial, and important issues facing any Administration. Decisions on such matters are the most likely to "arouse the most intense feelings." *Pierson v. Ray, supra,* 386 U.S. at 554. On the other end of the spectrum, any modern President comes into tangential contact with literally thousands of minor matters that reach his desk precisely because they have become controversial. The issue of Fitzgerald's employment, which Mr. Nixon encountered in the context of two press conferences, is a prime example.

The President is also particularly vulnerable to politically-motivated lawsuits. A President's election to office can be viewed as a mandate for significant changes in policy. In such instances, the President will be both the prime mover of those changes and their visible symbol. It is naive to suggest that political opponents will not resort to the courts, perhaps for motives that they consider valid, in an attempt to thwart the President personally or the policies he represents. As an experienced district judge (who sat as the trial court judge in this case) observed, "[M]any of these cases are political in character [and] involve highly controversial acts." *Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).[13] Nor will all such suits be well-intentioned. It is likely that claims seeking damages directly from a President will also be motivated by a

[13]The suits brought against former President Nixon have included *Bohmer v. Nixon,* No. 75-4-T (S.D. Cal. June 21, 1976) (suit by "self-styled critics of the American form of government, and of the Nixon Administration"); *Fonda v. Nixon,* Civil No. 73-2442-MML (C.D. Cal. May 23, 1974) (suit with "obvious political overtones"); and *People Versus PORN (Profit of Richard Nixon) v. Nixon,* No. 80-1720, *cert. denied,* 49 U.S.L.W. 3911 (U.S. June 9, 1981).

desire for publicity, the wish to obtain discovery of Presidential documents, and the goal of harassment.

Recent decisions have lowered other obstacles to litigation. As this case illustrates, it is now easy for any reasonably-imaginative counsel to plead an implied right of action, based on a federal statute or Constitutional provision, that will survive a motion to dismiss. *See Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).[14] Suits against the President, if allowed, will be responsive to the same factors responsible for the recent explosion in suits against government officials. *See Butz v. Economou, supra*, 438 U.S. at 526 (Rehnquist, dissenting); Director of the Administrative Office of the United States Courts, *Annual Report*, Table 28 (1980).

The relative scarcity of civil damage actions against Presidents to date is not evidence that the President is safe from improperly-motivated or nonmeritorious claims. That circumstance is attributable to the historical understanding, only recently questioned, that the President is absolutely immune. *See* pp. 23-26, *supra*. There is no reason to believe that he will be exempt from the general plaintiff's practice of suing all conceivable defendants and relying on discovery to narrow the field (if in fact the field is ever narrowed).[15]

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[14]The decision of the district court, which for the first time approved implied rights of action under 18 U.S.C. § 1505 and 5 U.S.C. § 7211, epitomizes the continuing willingness of lower courts to award civil damages on the basis of a variety of statutes, notwithstanding this Court's recent decisions in such cases as *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Ordinarily, when a district court issues such a ruling, review must await a final judgment.

[15]The *Halperin* court drew the wrong conclusion from its observation that "suits that may be *successfully* pursued against a

[footnote continued]

C. The Burdens Of Modern Litigation

The immediate and unavoidable consequence of any suit in which the complaint surmounts relaxed standards applicable to allegations in a pleading is to require a President to participate in his own defense. The very process of responding to suits seeking civil damages imposes substantial costs on a present or former President, in terms of both time and money. Moreover, if a suit is filed against a President in office, it diverts the Chief Executive's attention from the public business. Such suits would "consume time and energies which would otherwise be devoted to governmental service." *Barr v. Matteo, supra,* 360 U.S. at 571 (plurality opinion); *see Imbler v. Pachtman, supra,* 424 U.S. at 425. The public's interest in the undivided attention of the Chief Executive compels recognition of a defense, absolute immunity, that allows him to perform his duties without interruption and without fear of immediate or postponed involvement in time-consuming and expensive litigation.

It is wishful thinking to believe that suits against Presidents can be handled for them without their direct participation. Absent absolute immunity, central issues in a suit against a President are sure to include the extent of his participation in the events from which the suit arose, the degree of his knowledge of surrounding circumstances, and his intentions. The only direct source for this information, to which any reasonably diligent attorney must seek access in the first instance, is the President himself. At a bare minimum, the President would have to be interviewed in detail at the outset and as often thereafter as is necessary as facts or allegations emerge. A President is also entitled, like any other litigant with his personal financial position at stake, to

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President will be quite rare." 606 F.2d at 1212 (emphasis added). The small percentage of successful suits weighs in favor of absolute immunity, which would protect the President from the inhibiting effect and burden of the great majority.

confer with his counsel on developments in a suit and to make informed decisions on the overall conduct of his defense. Discovery may also take up still more of his time. If the suit finds the President still in office, time spent on these unavoidable tasks will reduce the total available for public business. Presidents in office cannot be expected to put off dealing with suits filed against them and thereby accept the disadvantages that necessarily accompany delay, such as fading memories and mounting expenses.

The financial impact on a present or former President of responding to suits is also substantial. This Court may take judicial notice of the burgeoning costs of litigation. The primary element of these expenses is attorneys fees. Legal bills running into the hundreds of thousands of dollars for complex cases are not at all unusual. A President is not necessarily able to rely on free representation and will have to act accordingly.[16] This burden, with which a President will be saddled regardless of the outcome of a suit, creates tremendous pressure for nuisance value settlements which nonetheless have a

[16]The Justice Department has undertaken representation of many government officials as a matter of policy. *See* 28 C.F.R. § 50.15. However, this regulation furnishes Presidents with uncertain protection against the massive costs of counsel. Fitzgerald himself has challenged the regulation on the grounds that it is in excess of authority conferred by statute (R. 237), and others can be expected to continue the attack as a means of increasing their leverage. By its terms, the regulation is only permissive; it thus provides no guarantee of representation. Most important, the President may justifiably be concerned about Department of Justice representation. Where a plaintiff has joined the President with other officials as defendants, their defenses may well conflict, and the President may desire or require separate representation. Justice Department counsel must respect policy decisions by political appointees, perhaps members of an opposing political party, that may affect management of a President's case. And, like any other litigant with his personal estate at stake, a President may wish to choose an attorney, rather than accept the Department's designated lawyer.

substantial impact on his personal finances. Finally, to the costs of counsel are added the many substantial and necessary out-of-pocket expenses that a President may incur—travel, expenses for counsel, transcripts, fees to bring witnesses to court, fees for experts, and many others.

An aspect of civil suits that is particularly burdensome is discovery. This Court has recently noted (*Herbert v. Lando, supra,* 441 U.S. at 176 (1979) (footnote omitted)):

> [M]ushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus.

See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975); *ACF Industries, Inc. v. EEOC,* 439 U.S. 1081 (1979) (dissent from denial of certiorari).

This case furnishes an indication of just how burdensome discovery can be. The size of the record in this case (*see* JA 1a-53a) largely reflects the demands of discovery in a case in which the President was at one point alleged to be legally liable, under a conspiracy theory, for the actions of seventeen people in several Administrations over a period of ten years. *See* R. 140, 471 (Opposition), pp. 8 & n.9, 10. Mr. Nixon was deposed twice for a total of three days, and other deponents in this suit, which arose out of the termination of one middle-level Defense Department employee, included Melvin Laird, Henry Kissinger, Alexander Haig, and James Schlesinger, among many other government officials. Discovery ranged as far afield as the questions whether Alexander Butterfield was a CIA agent (Haldeman Dep. I (R. 418) 187-96), and whether a low-level White House aide participated in the decision to replace Robert Dole as Chairman of the Republican National Committee (Higby Dep. 56-63).

Absent a defense that can be reliably established on the pleadings, the full burden of modern discovery will fall squarely on Presidents sued for civil damages. In material terms, this burden includes time lost in responding to discovery and in being deposed, and the cost of counsel. It also entails the gratuitous loss of privacy inherent in examination regarding "credibility" and disclosure of financial data in the context of a request for punitive damages. Discovery will also necessarily divert high-level White House officials, who even if not named as co-defendants will be inevitable targets of discovery, and threaten the confidentiality of Presidential decision-making. As is discussed in more detail below (pp. 44-48, *infra*), these aspects of discovery threaten not only the President's personal interests but the integrity of the office. The concerns voiced in a separate opinion in *Halperin v. Kissinger* are thus amply justified (606 F.2d at 1214 (Gesell, J., concurring)):

> Each such suit [against high government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to officials involved.[17]

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[17]It is frequently suggested that burdensome discovery may be curbed by the supervision of alert district court judges or by protective orders staying burdensome aspects of the litigation, such as discovery, until after a President has left office. However, such suggestions do not solve the problem. The discretionary decisions of hundreds of overworked district judges do not furnish the certainty needed to foreclose the anxiety created by civil damages exposure. Moreover, their discretion must be exercised in accordance with Rules of Civil Procedure that create an explicit

[footnote continued]

In short, the inhibiting effect of civil suits on a President's "vigorous and fearless performance" of his duties, *Imbler v. Pachtman*, 424 U.S. at 427, is not the result solely of the understandable concern as to the "inevitable danger" of an adverse outcome, *Gregoire v. Biddle, supra*, 177 F.2d at 581. It is also the result of many unavoidable costs of participating in a lawsuit.

D. The Inhibiting Effect Of Potential Liability

The classic rationale for absolute immunity has also focused on the negative influence that exposure to civil damage liability has on responsible decisionmaking. That rationale is as applicable here as in the context of any other official. Presidents share the same personal aspirations, responsibilities, and concerns that make the prospect of civil liability threatening to judges, prosecutors and legislators—among them, the needs of a family, the hope of a secure life after retirement, and the threat of catastrophic illness. If exposure to civil liability is understood as a threat to the public's interest in "fearless" action by these officials, it should not be

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presumption in favor of unlimited discovery. *See* Rule 26(b)(1), F.R.Civ.P. ("Parties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action."). Lastly, because only judicial refusals to permit discovery are likely to create any possibility of reversal, the targets of discovery have few practical means of obtaining appellate review and district judges have an incentive to err on the side of overbroad discovery.

The suggestion that delay in the filing of an action or a stay until the President has left office provides sufficient protection is equally shortsighted. For one thing, such a step only postpones the expense of litigation. Moreover, the passage of time, which inevitably results in dimmed memories and the loss of evidence, works against a defendant. The record of this case is replete with examples of attempts by Fitzgerald to capitalize on lost memory. *See* R. 446, pp. 18-20. Indeed, former President Nixon was deposed on a second occasion in this case because he had forgotten some of his efforts some eight years earlier on Fitzgerald's behalf. Only when documents reflecting these efforts surfaced at a late stage of discovery was Mr. Nixon's recollection refreshed.

viewed differently in the case of Presidents. *Cf. Tenney v. Brandhove,* 341 U.S. 367, 377 (1951) ("One must not expect uncommon courage even in legislators.").

In fact, for at least two reasons, a President may justifiably be more concerned than the average litigant about the possibility of an adverse judgment. The first is that a President arrives in any courtroom as a well-known (and perhaps for some, a notorious) figure. The very visibility that makes him a likely target for a suit also jeopardizes the objectivity of a jury. The second reason for increased concern is the fact that the scale of priorities and perspective of a President may be difficult, if not impossible, to convey to a lay jury. *See Imbler v. Pachtman,* 424 U.S. at 425 (suits against prosecutors will involve "the resolution of some technical issues by the lay jury"). For instance, in this case, the parties and the Court estimated that a month's trial would be necessary on a matter that consumed perhaps a half hour of former President Nixon's time over the course of four years. With that degree of immersion in the details of the matter, could the jury have been expected to comprehend the context, in terms of competing demands on Presidential time and attention, in which Fitzgerald's problem reached Mr. Nixon, particularly since Mr. Nixon might well have been unable to testify regarding other privileged matters then before him?

E. The Interests Of Potential Plaintiffs

Absolute immunity unquestionably entails subordinating the interests of rare plaintiffs who would otherwise be entitled to recover on a claim against a President. This sacrifice has been justified in the case of other officials, knowingly and willingly, on the ground that it is impossible to weed out meritorious claims without incurring the greater costs to the public interest that are inherent in exposing those officials to civil damage liability.

Imbler v. Pachtman, supra, 424 U.S. at 428; *Gregoire v. Biddle, supra,* 177 F.2d at 581. Nevertheless, the extent of that sacrifice should not be overestimated.

An array of administrative and judicial remedies exists under Civil Service statutes and the Federal Tort Claims Act to provide compensation to the alleged victims of unlawful action. Indeed, in this very case, Fitzgerald initiated several administrative proceedings which resulted in his being reinstated to the Department of the Air Force with full backpay. Plaintiffs are also free to pursue non-judicial remedies.

Civil damage liability is unnecessary to deter Presidential misconduct. A decision upholding the form of absolute immunity historically available to Presidents would leave in place the full system of restraints relied on by the Framers of the Constitution. *See* pp. 23-24, *supra.* For serious offenses, "Treason, bribery, or other high crimes and misdemeanors," a President may be impeached. U.S. Const., Art. II, § 4. After impeachment, the President is also subject to criminal prosecution. U.S. Const., Art. I, § 3. As this Court has recently reaffirmed, Presidential actions are also subject to direct judicial review through equitable actions to restrain the inferior officials through whom he acts. *E.g., Dames & Moore v. Regan, supra.*

More important even than the threat of these formal adjudicatory procedures are restraints imposed by the political system. The system of checks and balances among co-equal branches, "buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose." *United States v. Brewster,* 408 U.S. 501, 523 (1972). *Brewster*'s reliance on the influence exercised by a free press applies with particular force to the President, whose actions are the subject of an unparalleled degree of attention. The President per-

forms his official actions in a "fish bowl," subject to the scrutiny of a full-time contingent of reporters, historical commentators, interest group representatives and other observers. Moreover, alone of all Executive officials, the President must account directly to the public in elections. In an analogous context, this Court emphasized that primary reliance should be placed on non-judicial restraints (*Tenney v. Brandhove, supra,* 341 U.S. at 378; footnote omitted):

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.

The same is true of the Presidency. There is no need to subject a President to actions by self-chosen "private attorney generals."

F. The Inadequacy Of Qualified Immunity

Qualified "good faith" immunity is not a sufficient guarantee of the public's interest in the "vigorous and fearless" performance of Presidential duties. That form of immunity is unavailable if the defendant (*e.g., Wood v. Strickland,* 420 U.S. 308, 322 (1975)):

> knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the rights of the [plaintiff], or * * * took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [the plaintiff].

This defense presents no obstacle whatever to a plaintiff at the pleading stage. *Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 348; *Gomez v. Toledo,* 100 S. Ct. 1920 (1980). It cannot be resolved without full-blown discovery into the merits of the case, since it makes relevant the precise nature of the defendant official's actions, all

information on which he relied or failed to rely, and all surrounding circumstances. Finally, because qualified immunity ultimately focuses on an official's state of mind, it offers no realistic prospect of summary judgment and thus routinely exposes the official to a jury's judgment on his motives.[18]

As the author of the separate opinion in *Halperin v. Kissinger* correctly observed (606 F.2d at 1214):

> It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient.

An immunity of this nature, which does not offer any shield against the burdens of litigation and "may only be sustained after elaborate judicial inquiry into the circumstances under which an act was performed," is "of virtually no use." *Doe v. McMillan, supra,* 412 U.S. at 339 (Rehnquist, J., concurring and dissenting). *Accord, Tenney v. Brandhove, supra,* 341 U.S. at 377.

G. The Balance

Viewed together, these factors compel the conclusion that the "interests behind" absolute Presidential immunity fully justify its continued recognition. The President's unparalleled constitutional duties, his special vulnerability to suit, the *in terrorem* effect of ultimate

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[18]One final aspect of qualified immunity is also troublesome. To the extent that it focuses attention on the "reasonableness" of Presidential action, qualified immunity invites the involvement of other Presidents in litigation. The best witness as to what conduct is reasonable or unreasonable in light of the competing demands on a President is surely someone who has been under those same demands.

liability, and the burdens of litigation have supported Presidential immunity to date and still support it. The decisions of an elected and accountable President should be determined by his best assessment of the public interest and not, with a lawyer by his side, by the likelihood that a course of action might expose him to a personal claim for damages.

Recognition of absolute immunity for the official actions of a President does not rest on the premise that the President is "an omniscient leader cloaked in mystical powers," or that he is "above the law," as the D.C. Circuit has suggested, *Halperin v. Kissinger, supra,* 606 F.2d at 1213. Immunity reflects a principled choice, with its roots in the public interest, that dates far back into the English common law. Absolute immunity no more places the President "above the law" than it does the members of the two other Branches of the federal government who enjoy its protection. As Judge Hand held in *Gregoire v. Biddle, supra,* 177 F.2d at 581:

> The justification for [recognizing absolute immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.
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> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

We emphasize that this case does not involve a situation where Congress has examined the interests for and

against immunity and, on behalf of the public, has declared that the asserted interests on which absolute immunity has traditionally rested need not be given effect. *See United States v. Johnson*, 383 U.S. 169, 185 (1966) (reserving comparable issue in context of Speech or Debate Clause). Moreover, the civil damages remedies on which Fitzgerald relies—implied rights of action based on the First Amendment, 18 U.S.C. § 1505, and 5 U.S.C. § 7211—are wholly judicial in their origins. Finally, as petitioners Harlow and Butterfield persuasively demonstrate, this is also a case in which a well-developed system of Civil Service remedies has been available and in fact obtained by Fitzgerald. Without suggesting that these circumstances mark the boundaries of absolute Presidential immunity, they surely buttress the conclusion that the judiciary should not open the door (closed for nearly two hundred years) to damage actions against the President in this case.

IV.

ABSOLUTE PRESIDENTIAL IMMUNITY IS A PROPER MEANS OF SAFEGUARDING THE INTEGRITY OF THE EXECUTIVE BRANCH

The classic rationale for absolute immunity revolves around the negative impact of civil damage liability on an official's ability to conduct the public's business. Absolute Presidential immunity is also grounded in the need to preserve a balance between the three coordinate Branches of the federal government. If Presidents are not absolutely immune, their motives and thought processes will routinely be the subject of review by members of the Judiciary. A necessary consequence of civil liability will also be examination of the President's confidential communications. Because these necessary consequences of civil liability would threaten the balance between the Executive and Judicial Branches, absolute Presidential immunity should not be abrogated.

The principle of separation of powers is "essential to the successful working of" our Constitutional system. *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). While this principle is no longer understood to require that "each of the three general departments of government [be] entirely free from the control or coercive influence, direct or indirect, of either of the others," *Humphrey's Executor v. United States, supra*, 295 U.S. at 629, it does mandate a "proper balance between the coordinate branches." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). In the analogous context of the Speech or Debate Clause, this Court has noted the contribution that legislative immunity makes to the proper balance between the coordinate Branches. One of its purposes is "to prevent accountability before a possibly hostile judiciary." *E.g., United States v. Johnson, supra*, 383 U.S. at 179; *Gravel v. United States*, 408 U.S. 606, 617 (1972).

An important aspect of Congress' protection "from a possibly hostile judiciary" under the Speech or Debate Clause is its members' freedom from inquiry into the motivation for their legislative acts. *United States v. Brewster, supra*, 408 U.S. at 512; *United States v. Johnson, supra*, 383 U.S. at 184-85. The Court understood that such "judicial oversight" would "realistically threaten[ ] to control" a legislator's conduct, even if its stated purpose was to determine whether a member of Congress had violated a *criminal* statute. *Gravel v. United States, supra*, 408 U.S. at 618.

Absolute Presidential immunity from civil damage liability is appropriate to provide the Executive Branch with the same protection against intrusive judicial oversight of the President's motives. The more limited defense of qualified immunity throws open the motives and reasoning underlying all Presidential actions to investigation and the retrospective judgment of the

judiciary. *See* pp. 41-42, *supra*. Under those standards, a trial court and perhaps a jury must pass judgment on the validity of the President's motives. The qualified immunity defense thus necessarily "embroil[s] [judges and] juries in passing upon the intricacies of executive decisionmaking." *Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J.). Moreover, they do so with hindsight, and without an understanding of the pressures of the moment which prompted a President's actions.

A second related consequence of exposing the President to civil damage liability is to undercut the confidentiality of Presidential communications in a manner inconsistent with this Court's reasoning in *United States v. Nixon,* 418 U.S. 683 (1974). Where an ultimate issue is what the President "knew or reasonably should have known," discovery understandably focuses on all communications—written or oral—by which the President obtained knowledge of a matter. Served with a request for discovery seeking this information, a President is faced immediately with a Hobson's choice. He may waive the presumptive Presidential privilege, to the detriment of the public interest in confidentiality, in order to protect his personal estate, or he may invoke it at the risk of being denied the defense of qualified immunity due to the unavailability of evidence on one of its essential elements. If he invokes the privilege, the court then faces the difficult choice of whether to grant a plaintiff information concededly relevant to an issue in the case or to honor a generalized principle of confidentiality. These unavoidable circumstances work toward routine disclosure of Presidential communications, and thus undercut the very substantial separation-of-powers interests underlying the Presidential privilege. *United States v. Nixon, supra,* 418 U.S. at 705-06, 708, 715.

In the context of the Speech or Debate Clause, this Court has recognized the purpose of that privilege

as being "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). Absolute immunity from civil liability for the Executive would serve the same goal for the same reasons.[19]

In closing, it is appropriate to rebut the D.C. Circuit's conclusion that *Butz v. Economou, supra,* not only frames the questions posed by this case, but also compels the conclusion that the President is entitled only to qualified immunity. As the analysis above demonstrates, there are a number of grounds distinguishing the President from the officials at issue in *Butz*. These include the dearth of suits against Presidents during the nearly 200 years following creation of that office, the President's status as the only executive official deriving authority from the Constitution and the repository of the "executive Power," the President's personal accountability to the public directly in periodic elections, the visibility of the office, and the magnitude of the responsibilities that the President is called upon to perform. These factors, and others discussed above, bring the President within explicit exceptions recognized

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[19]There is not, of course, a precise parallel between the protection afforded by the Speech or Debate Clause and absolute Presidential immunity. Most important, the Speech or Debate Clause protects against both civil and criminal proceedings.

The absence of an explicit reference to absolute Presidential immunity in the text of the Constitution does not, as the D.C. Circuit has indicated, *Halperin v. Kissinger, supra,* 606 F.2d at 1211, preclude its recognition as an incident of the principle of separation of powers. In resolving issues regarding that principle, it is customary to advert to the implications of the structure created by the Framers as well as the specific textual provisions by which they erected that structure. For instance, the privilege for Presidential communications was recognized as "inextricably rooted in the separation of powers under the Constitution," *United States v. Nixon, supra,* 418 U.S. at 708 (footnote omitted), although it is not referred to in the text.

in *Butz* for "officials whose special functions require a full exemption from liability" and "situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 438 U.S. at 507-09 (footnote omitted). *Butz* cannot and should not be interpreted as foreclosing absolute immunity for all "executive" officials, except perhaps those performing functions that are somehow "judicial" in character.

V.

THE CLAIMS ASSERTED AGAINST FORMER PRESIDENT NIXON IN THIS CASE ARE PRECLUDED BY ABSOLUTE PRESIDENTIAL IMMUNITY

Under this Court's cases, the scope of an official's immunity is determined with regard to his duties and responsibilities. Immunity is available if an alleged action has "more or less connection with the general matters committed by law to his control or supervision," as opposed to "matters which are manifestly or palpably beyond [an official's] authority." *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). *See Barr v. Matteo, supra*, 360 U.S. at 575 (plurality opinion) (it is enough that the action "was within the outer perimeter of [the official's] line of duty"); *id.* at 577-78 (Black, J., concurring) (it is enough that the action was not "plainly beyond the scope of [the defendant's] official business, but instead related more or less to general matters committed to his control and supervision").

These standards are formulated broadly in order to assure that the determination of whether a claim falls within the scope of an official's immunity does not collapse into the merits of the claim against him. "[A]ny allegation that an official, acting under color of law, has deprived someone of his rights necessarily implies that, in the particular case, the official exceeded his authority. Such logic would completely abrogate the doctrine of

immunity." *Briggs v. Goodwin*, 569 F.2d 10, 15 (D.C. Cir. 1977) (footnote omitted), *cert. denied*, 437 U.S. 904 (1978). *Accord, Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

Fitzgerald's case rests on the allegations that former President Nixon "approved" the abolition of his job, either before or after Secretary Seamans signed the operative order, and that Mr. Nixon subsequently invoked executive privilege to "cover up" White House involvement in the termination. R. 308, pp. 7-11. Without conceding the validity of these allegations, it is clear that all actions attributed by Fitzgerald to Mr. Nixon met the standards outlined above. Former President Nixon had the statutory authority to "prescribe" the manner in which Secretary Seamans would "conduct the business of the Department [of the Air Force]," 10 U.S.C. § 8012(b), and Seamans in turn had authority to fill the "Schedule A" civil service position held by Fitzgerald, replace its current occupant or reorganize the agency to abolish it. *See* 10 U.S.C. § 8012(e) (authorizing Secretary of the Air Force to "assign, detail and prescribe the duties of * * * civilian personnel"); 5 C.F.R. § 6.3.[20] Mr. Nixon's alleged "approval" of Fitzgerald's termination was thus within his statutory authority to "prescribe" Seamans' management of the Air Force. *See National Treasury Employees Union v. Reagan*, No. 81-1294 (D.C. Cir. August 11, 1981), slip op. at 17.[21] Invocation of executive privilege for White House communications

[20] Fitzgerald's "Schedule A" position (which was constituted by 5 C.F.R. § 213.3109(a)) is in the "excepted" civil service—*i.e.*, is not filled through the competitive procedures followed in the career civil service and is not tenured. 5 U.S.C. §§ 2102-03. The officials in such positions are appointed by the head of the agency involved, in Fitzgerald's case, the Secretary of the Air Force.

[21] The district judge ignored 10 U.S.C. § 8012(b) in concluding that "the President had no authority to hire, discharge or interfere with the employment of an employee such as Fitzgerald." JA 57a.

is also a matter committed to the President's authority. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

It is immaterial, for purposes of the immunity defense, that Fitzgerald has also alleged that actions by former President Nixon were taken for the unlawful purpose of penalizing the exercise of constitutional rights. An alleged action otherwise entitled to immunity does not lose that protection simply because it is alleged to have been taken "maliciously" or for some improper purpose. *E.g., Spalding v. Vilas, supra*, 161 U.S. at 499; *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 349-50; *Pierson v. Ray, supra*, 386 U.S. at 554; *Barr v. Matteo, supra*, 360 U.S. at 575. If Presidential immunity is to perform its function, it must not be allowed to depend on the issue of whether a President's action was wrongfully motivated, and thus legally unauthorized in some narrow sense. Such allegations are the easiest to make and, if allowed to defeat immunity, would undercut the historical, policy-oriented, and constitutional grounds for the privilege.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss the plaintiff's Second Amended Complaint with prejudice.

Respectfully submitted,

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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent,

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a former President and two of his former assistants are absolutely immune from civil suit for damages for their actions while in office, including the removal of a civil servant in retaliation for his testimony to Congress, in violation of his rights under the first amendment and federal statutes.*

---

* Petitioners also present the question of the appealability under the collateral order doctrine of a district court order denying defendants' motions for summary judgment on the ground of absolute immunity. Petitioners Harlow and Butterfield further seek to raise questions not presented in their notice of appeal below or in their petition for certiorari. These issues are treated in Part V of this Brief, pp. 41 to 48, *infra*.

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---

BRIEF FOR RESPONDENT

STATEMENT

This case concerns the degree of immunity from civil damages available to a former President and presidential assistants for actions while in office. Petitioners invoke absolute immunity as a bar to trial and a complete defense to liability in a damage action brought by respondent. The gravamen of respondent's action is that petitioner Nixon, while serving as President, and petitioners Harlow and Butterfield, while serving as his assistants,

knowingly participated in a conspiracy to remove respondent from his position as a management analyst with the Department of the Air Force in retaliation for his testimony to Congress.

The basic facts of this case[1] are not significantly controverted:

1. Before November 13, 1968, Ernest Fitzgerald had an exemplary record of public service that included letters of commendation and award nominations.

2. On November 13, 1968, Fitzgerald testified truthfully and accurately before a joint congressional subcommittee on a significant public issue.

3. Shortly thereafter, Fitzgerald became the object of a removal effort, and within a year his position was abolished in a "reorganization."

4. Petitioner Nixon later stated, publicly and privately, that as President he had ordered the discharge of Fitzgerald, that he had made the decision, and that he stuck by it.

A. Fitzgerald's Testimony

On November 13, 1968—after Mr. Nixon was elected President, but before he took office—respondent Fitzgerald, an Air Force civilian management analyst, was called to testify before a subcommittee of the Joint Economic Committee of Congress.[2] Testifying with the

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[1] Citations to the record will follow the format used in petitioner Nixon's brief. Material in the Joint Appendix will be cited as "JA ——". Depositions not reprinted in the Joint Appendix will be cited as "[Deponent] Dep. (R ——) ——". "R. ——" refers to the docket entries reprinted in the Joint Appendix, JA 1a-53a.

[2] Fitzgerald was initially approached in the summer of 1968 by a member of the subcommittee staff who had been informed that Fitzgerald was "an interesting person to talk to because of his expertise" in defense procurement and cost controls. JA 122a.

approval of the Department of Defense,[3] Fitzgerald disclosed for the first time that the projected cost of the C-5A cargo airplane might run as much as $2 billion over the original estimate.[4] Fitzgerald's testimony did not disclose any confidential or classified information and did not directly criticize anyone in the Department of Defense. His superiors later publicly acknowledged that his testimony had been truthful, proper, and accurate.[5]

Behind the scenes, however, Fitzgerald's testimony triggered a bitter reaction within the Pentagon. A memorandum was prepared for then-Secretary of the Air Force Harold Brown outlining three methods by which Fitzgerald could be removed, including a "reduction-in-force" to discharge Fitzgerald without observing the usual Civil Service safeguards. JA 209a-211a; *cf.* JA

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[3] *Economics of Military Procurement: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess. 199-200 (1968-1969) [hereinafter cited as *C-5A Hearings*].

[4] Fitzgerald did not volunteer this information. The chairman of the subcommittee, Senator William Proxmire, prompted Fitzgerald to concede that this figure "could be approximately right." *C-5A Hearings*, *supra* note 3, at 200-01.

[5] Defense Secretary Melvin R. Laird, for example, stated before a congressional subcommittee in 1970 that "Mr. Fitzgerald's position on the C-5A cost overrun has been correct." *Department of Defense Appropriations for 1970: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 1st Sess. 457 (1970), JA 257a. *See also The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. 101 (1969) (statement of Secretary of the Air Force Robert C. Seamans, Jr.) [hereinafter cited as *Fitzgerald Hearings*]. The latter hearings explored the reasons for Fitzgerald's dismissal. The focus of the hearings was "whether Congress has a right to ask and receive nonclassified information about public matters and contracts without those who give such information, truthfully and properly, losing their jobs." *Id.* at 2 (statement of Chairman Proxmire). One prominent exhibit was a letter to the President signed by 61 Members of Congress protesting the "firing of this dedicated public servant" as a "punitive action." *Id.* at 115, JA 177a-179a.

202a.[6] On January 9, 1969, three days later, Secretary Brown met with the incoming Secretary of the Air Force, Robert Seamans. Brown told Seamans that the Air Force was upset because Fitzgerald had publicly aired his views on the C-5A before Congress. Seamans apparently told Brown he recognized that Fitzgerald was "of no use to the Air Force." JA 194a.

Shortly after Seamans took office in February 1969, Fitzgerald's immediate superior, Thomas Nielsen, began pressing Seamans to reorganize the Office of Financial Management "with an idea that Ernie's job wouldn't be there anymore." JA 203a. Seaman's refrained from adopting this proposal until a new assistant secretary could be named to replace Nielsen, who was leaving the government. *Id.*

B. White House Involvement

On May 9, 1969, Seamans called petitioner Harlow to discuss the Fitzgerald matter. JA 186a. Six days later, Seamans met with Harlow at a White House breakfast and solicited his advice "as to timing & how to procede."

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[6] By contrast, before Fitzgerald testified on the C-5A, Secretary Brown had approved a plan to reorganize Fitzgerald's office so as to *increase* his responsibilities in the cost control area. JA 293a-295a. This was not surprising in light of Fitzgerald's distinguished record of public service. He was nominated for the Department of Defense Distinguished Civilian Service Award in February 1967 and for the Air Force Association's Citation of Honor in November 1967. JA 237a-255a.

In seeking to show that Air Force action against Fitzgerald was not retaliation for his testimony, petitioners suggest that the Civil Service Commission appeals examiner found that Fitzgerald had planted a story with the *Washington Post* to put "the Air Force in a bad light." Harlow/Butterfield Brief at 4; *see* Nixon Brief at 6 n.3. There is no evidence in the record that Fitzgerald was responsible for the story, and the appeals examiner referred to this merely as a supposition of Air Force officials. *Decision on the Appeal of A. Ernest Fitzgerald*, U.S. Civil Service Commission, Appeals Examining Office at 8, 16-17 (Sept. 18, 1973) [hereinafter cited as *CSC Decision*], JA 74a, 82a.

JA 187a; *cf.* JA 205a.[7] Although aware that the "reorganization" plan was tied to Fitzgerald's congressional testimony, *see* JA 150-152a, Harlow did not advise Seamans to drop the idea, but instead counseled him that the timing was wrong. JA 205a.[8]

On June 17, 1969, Fitzgerald was called before the congressional subcommittee for further testimony on defense cost overruns. Following this appearance, Fitzgerald's standing in the Air Force deteriorated further, although the Air Force never attempted to refute any of Fitzgerald's testimony. *Fitzgerald Hearings*, *supra* note 5, at 15.

On November 4, 1969, less than a year after his initial testimony, the Air Force announced that Fitzgerald's job would be eliminated January 5, 1970, as a result of a "reorganization" of his office. JA 212a. On the day the announcement was made, Secretary Seamans again consulted with Harlow. JA 186a. The next day, Nixon aide Clark Mollenhoff, the designated White House "ombudsman," called Seamans to request an explanation of Fitzgerald's firing. JA 206a-207a. The Air Force failed to persuade Mollenhoff that the "reorganization" was not a pretext, and Mollenhoff prepared a memorandum for the President, dated November 17, 1969, warning that the Fitzgerald firing would be widely perceived as retaliation for Fitzgerald's testimony on the C-5A. JA 259a-261a.

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[7] Contrary to Harlow's present account, *see* Harlow/Butterfield Brief at 6, this was more than a "happenstance" meeting. At his deposition, Harlow recalled that Seamans called him out of a very important meeting to talk about the Fitzgerald matter. JA 113a.

[8] Two days later, on May 17, 1969, Secretary Seamans and Secretary Laird met with the President to discuss cancellation of the Manned Orbiting Laboratory. A presidential aide present at the meeting later recalled that Mr. Nixon referred with disapproval to the "Fitzgerald kind of thing." (Schlesinger Dep. (R. 432) at 13-14, 31-33). This, of course, places Mr. Nixon's awareness of the Fitzgerald matter some six months earlier than the date referred to in Nixon Brief at 9.

Mollenhoff's memorandum was addressed to the President through Harlow, who took it to Mr. Nixon and discussed it with him. JA 259a; Mollenhoff Deposition, JA 128a-129a.[9] As Mr. Nixon later recalled it, Harlow "was all for canning" Fitzgerald. JA 284a. The Fitzgerald matter was recalled to be "all Harlow's ball game." *Id.*[10] The Fitzgerald case was also brought to the President's attention by White House aide Patrick Buchanan in the preparation for President Nixon's December 8, 1969, press conference. In a one-page memorandum enclosed in President Nixon's briefing book, Buchanan endorsed Mollenhoff's view that the Air Force was "firing . . . a good public servant" and joined in Mollenhoff's suggestion that the President order Fitzgerald retained in a Defense Department job. JA 269a.[11]

At a later press conference, however, President Nixon acknowledged that he personally was responsible for the

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[9] Nixon asserts that this memorandum never reached him, citing the deposition testimony of Egil Krogh and Harlow. Nixon Brief at 8 n.5. Krogh and Harlow's vague and forgetful statements are directly contradicted by Mollenhoff's testimony that Harlow assured him the memo had been discussed with the President. Mollenhoff Deposition, JA 128a-129a. Discovery cannot be said to have "disclosed" the correct answer on this issue. *Compare* Nixon Brief at 8 n.5. Moreover, Mollenhoff's statement tends to show that, contrary to the suggestion in his brief, Mr. Nixon was aware of the Fitzgerald case well before preparation began for his December 8, 1969 press conference. *Compare id.* at 9.

[10] Harlow had conversations with Seamans regarding Fitzgerald's termination on four separate occasions: May 9, 1969; May 15, 1969; November 4, 1969; and December 5, 1969. JA 186a. Harlow also discussed the matter with Nixon. *See* JA 221a.

[11] At no point in the correspondence to Mr. Nixon did either Mollenhoff or Buchanan state as his personal opinion that the widespread public impression of Fitzgerald's firing as retaliatory "was erroneous." *Compare* Nixon Brief at 9. Buchanan did suggest, apparently as a public relations move, that President Nixon should say at his press conference that this impression was erroneous. JA 269a.

firing: "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it." JA 185a. Although the President's press spokesman later attempted to retract this statement, JA 196a-199a, the White House tapes evidence Nixon's contemporaneous view of what he meant. Just hours after the press conference, Nixon told aide Charles Colson, "This guy that was fired. I'd marked it in the news summary. That's how that happened. I said get rid of that son of a bitch. You know, 'cause he is, he's been doin' this two or three times. So Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it." JA 214-215a.

A few minutes later, President Nixon had a conversation with John Ehrlichman in which he recalled the reason that Fitzgerald had been fired. In the conversation, Nixon told Ehrlichman that he "was aware of the case" because "Harlow had raised it with me I think." The conversation continued:

E: So did Clar—, so did Mollenhoff, interestingly enough, uh, this guy, had talked with both Mollenhoff and Harlow here. And I believe [that] at one time or another they both talked to you about it. But Harlow particularly talked to you about it. But you see [one fact]—

P: [unintelligible] canned.

E: —whether or not he should be, uh, well, he really wasn't fired, he was sort of transferred into a non-existent job.

P: So Harlow [unintelligible].

E: Oh yeah, yeah, definitely.

P: Well, that's what I thought.

E: He was a, he was a thorn in everybody's side, you see—

P: Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly].[12]

During 1969, petitioner Butterfield, a former Air Force colonel working in the White House, undertook a personal effort to see that Fitzgerald's employment was terminated. As early as May 1969, Butterfield circulated a memorandum inside the White House stating that Fitzgerald was planning to "blow the whistle" on "shoddy purchasing practices" in the Department of the Navy [*sic*] and noting that these allegations had been referred to the FBI for investigation. JA 274a. In January 1970, as Fitzgerald's Air Force job was being terminated, Butterfield called H.R. Haldeman to urge that Fitzgerald not be retained or reemployed. JA 279a.

Butterfield expressed the same views in writing, addressing a memorandum to Haldeman, with copies to Ehrlichman, Colson, Kissinger, and at least four other White House officials. Rather than reemploy Fitzgerald, Butterfield said, "[we] should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part." JA 181a.[13]

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[12] JA 221a. The specificity of this conversation is inconsistent with Nixon's later assertion that he had confused the Fitzgerald case with another matter. Indeed, the conversation occurs on the White House tapes *after* the point when President Nixon supposedly recognized that he was confusing Fitzgerald with Gordon Rule. *Compare* Harlow/Butterfield Brief at 10. Moreover, both Mollenhoff and Harlow had left the White House well before Rule's employment became an issue.

[13] Butterfield admitted to a journalist in 1973 that his action in writing and circulating this memorandum was not connected to his official duties. "I wasn't the kind of fellow that would normally advise Haldeman on anything—it wasn't my role at all. My role

C. Subsequent Events

Following his dismissal, Fitzgerald filed an action with the Civil Service Commission seeking reinstatement to his former position. After three years of litigation,[14] his case finally came up for public hearing in January 1973. Under questioning about who had approved the "reorganization" plan that led to Fitzgerald's dismissal, Seamans invoked executive privilege. JA 191a.[15] At the President's press conference the next day, Mollenhoff, by then a reporter covering the White House, asked Mr. Nixon if he had approved Seamans' use of executive privilege. The President responded:

> In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility in the White House—in this case it was a proper area in which the executive privilege should have been used.

JA 183a. Again, the White House tapes disclose Mr. Nixon's purpose. Referring to the firing of Fitzgerald, Mr. Nixon noted that Seamans had claimed executive privilege "because he knew that I had ordered it . . . . [T]hat's why I didn't back off of that." JA 215a.

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was almost purely administrative. . . . My memo was just from Alex Butterfield to Bob Hald[eman,] sort of two people, not in any official way at all." JA 297a.

[14] The proceeding was substantially extended by the government's appeal of a decision affirming Fitzgerald's right to an open hearing. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

[15] Although Seamans at one point testified that he had "never received any instruction" regarding the Fitzgerald dismissal, his full testimony indicates that he was attempting to avoid disclosing the true extent of White House involvement in the matter. In response to the direct question, "Did you consult with anyone or receive the advice of anyone in the White House?," Seamans stated, "That is the question I am not sure I have to answer." R. 255, Attachment I at 495.

To permit Seamans to continue to invoke executive privilege, and thus conceal White House involvement, the President directed Ehrlichman to prepare "the most godawful gobbledygook" statement on executive privilege "that will allow us to do everything that we want." JA 217a. When Seamans testified at the CSC hearing the following week, he again invoked executive privilege and refused to discuss his consultations with the White House. JA 300a-301a.[16]

Further to conceal the President's role in approving Fitzgerald's firing, press spokesman Ron Ziegler told the White House press corps on February 1, 1973, the day after the President's press conference, that Mr. Nixon "misspoke" himself when he admitted having made the

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[16] The petitioners rely heavily on the conclusions of the Civil Service appeals examiner, although as a result of Seamans' invocation of executive privilege, the examiner did not have a full record before him. *See, e.g.*, Nixon Brief at 4, 6 n.3, 12; Harlow/Butterfield Brief at 4, 6, 9. Moreover, the CSC proceeding was tainted from the outset. In May 1969, Secretary Seamans consulted with Robert Hampton, CSC Chairman, to determine how best to get rid of Fitzgerald. Seamans remembered Hampton telling him that, in light of Fitzgerald's protected job status, the "only alternative is to abolish his job." JA 205a. Later, with Hampton still Chairman, the Commission's appeals examining office was called upon to review the legality of Fitzgerald's removal.

The appeals examiner had no subpoena power, and Fitzgerald was unable to develop a full record at the administrative level. Secretary Seamans' testimony was riddled with inaccuracies and distortions. To take just one example, Seamans was asked about the President's statement at a January 31, 1973 press conference that "Mr. Seamans must have been talkin' to someone who had discussed the matter with me." Seamans testified that this was a "false statement." R. 255, Attachment I, p. 830. Yet Seamans knew that he had frequently discussed the matter with Harlow and Mollenhoff. Because Fitzgerald had no access to the documents demonstrating White House involvement until discovery began in this case, he was unable effectively to challenge Seamans' testimony at the administrative hearing.

decision to fire Fitzgerald. Ziegler also stated, in direct contradiction to disclosures on the White House tapes:

> We can find no record—the President requested that a check be made of this—of the matter ever being brought to the President's attention for a decision. So the decision regarding the reorganization that took place in the Air Force, which dealt with Mr. Fitzgerald, was a matter dealt with solely by the Air Force.

JA 196a.

On September 18, 1973, the CSC appeals examiner issued a decision ordering Fitzgerald "restored retroactively to January 5, 1970 to the position from which he was improperly separated." *CSC Decision, supra* note 6, at 20.[17] Although this decision provided an award of back pay, the award did not carry interest nor did it compensate Fitzgerald in any other way for his wrongful termination.

The present action, seeking damages, was instituted in the district court for the District of Columbia in January 1974. Nixon was named as a defendant in an amended complaint filed in July 1978. On February 12, 1980, petitioners moved for summary judgment. This was Nixon's second, Harlow's second, and Butterfield's third summary judgment motion. The district court denied their motions, ruling that petitioners were not absolutely immune, that genuine issues of fact precluded summary judgment on the issue of qualified immunity, and that Fitzgerald's complaint stated valid claims under the first amendment, 5 U.S.C. § 7211, and 18 U.S.C. § 1505. The district court denied a motion to certify these rulings for interlocutory appeal. Petitioners appealed the portion of the order denying absolute im-

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[17] Despite this order, entered more than eight years ago, Fitzgerald has still not obtained reinstatement to a position equivalent to his former one. *Fitzgerald v. Hampton*, No. 76-1486 (D.D.C. Mar. 3, 1981).

munity, invoking the collateral order doctrine. The Court of Appeals for the District of Columbia Circuit dismissed petitioners' appeals on April 30, 1980, and denied motions for rehearing and for rehearing en banc on July 14, 1980. This Court granted writs of certiorari on June 22, 1981.

SUMMARY OF ARGUMENT

I

Nixon makes the sweeping argument that he is absolutely immune from suit for damages for all actions he took while President. Not only does this assertion ignore the applicable decisions of the Court, but it is based on a supposed "historical understanding" that Mr. Nixon cannot establish. He relies on the silence of the Constitutional Convention about the liability of the President to civil suit when it framed the impeachment remedy and mechanisms of political accountability. But these mechanisms, as the Framers recognized, were directed at wrongs against the public as a whole—political wrongs—not at the deprivation of individual rights. The President was not accorded a "single privilege" by the Constitution; not a "single distinction . . . more" is attached to him than to "the lowest officer in the republic." President Jackson recognized in 1834 that the President is "liable to the private action of any party . . . in the same manner and to the same extent as the humblest functionary."

Against these and other statements, petitioner offers only comments concerning the President's "official inviolability" while in office. They do not support Mr. Nixon's contentions in this case, in which he was named as a defendant nearly four years after he left office. Mr. Nixon argues that the "historical understanding" of absolute presidential immunity is confirmed by the paucity of suits against the President. But there are other, more plausible explanations for the dearth of suits, including the difficulty of obtaining venue and personal jurisdiction over the President or a former President.

Nixon's position also does not square with the decisions of the Court, which hold that absolute immunity is not a badge of office, but is applied only where it is functionally required. Mr. Nixon offers no justification for according absolute immunity to the President while denying it to his counterparts in state governments and to Cabinet officers. The Court's decisions in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and *Butz v. Economou*, 438 U.S. 478 (1978), require not that the President be absolutely immune from suit, but that he be accorded a qualified immunity, whose applicability depends upon the circumstances of each case.

II

Nixon asserts that the presidential office requires absolute immunity. But he fails to establish that qualified immunity, especially applied on the sliding scale the Court endorsed in *Scheuer* and *Butz*, is inadequate to ensure the effective functioning of the Presidency. Absolute presidential immunity would sacrifice the interests of individuals, such as respondent in this case, whose rights have been violated by illegal and unconstitutional action of the President and his advisers. An appropriate balance requires qualified, not absolute immunity for the President, as well as for his assistants.

III

Nixon argues that the separation of powers requires absolute immunity for the President. In this argument, he seriously misapprehends the meaning of that doctrine. Separation of powers requires the accountability of executive officials who interfere with the ability of Congress to obtain information needed to perform its independent constitutional functions. This congressional interest is clearly at stake in this case. Moreover, Mr. Nixon's argument exaggerates the degree of intrusiveness into presidential communications involved in a civil damage suit like this one.

IV

Even if petitioners were otherwise entitled to absolute immunity, their claims are unavailing in this case because they have not established that their actions with respect to the termination of Mr. Fitzgerald's employment were within the scope of their authority. Unless the district court was clearly in error in ruling that there are genuine issues of disputed fact regarding the scope of each petitioner's authority, its denial of summary judgment should be affirmed.

The President has no constitutional authority to remove inferior officers whose appointment Congress has vested in the head of a department. Nor does the President's statutory authority over the Department of the Air Force extend to directing the Secretary to disregard protections accorded a veteran's preference employee like Fitzgerald by statute and departmental regulations. Regardless of Nixon's purpose, he was beyond the scope of his authority as President if, as he stated, he ordered Fitzgerald to be fired.

V

Harlow and Butterfield dispute the existence of the causes of action Fitzgerald has invoked. This issue is not properly before the Court. Fitzgerald's constitutional cause of action is supported by the Court's prior decisions. Implication of the statutory causes of action Fitzgerald invokes is appropriate under the tests enunciated by the Court; they are fully supported by congressional intent and the terms of the applicable statutes.

On the principal issue, petitioners have made no case for absolute immunity for the President or his assistants. And they have not established that they are entitled to absolute immunity in this case, even if it were otherwise available to the President and his aides. Accordingly, the Court should affirm and remand to the district court.

ARGUMENT

I. NEITHER CONSTITUTIONAL HISTORY NOR THE DECISIONS OF THE COURT SUPPORTS ABSOLUTE PRESIDENTIAL IMMUNITY

Mr. Nixon contends that, by virtue of the office he held, he is absolutely immune from liability in damages for all actions while in office, under any circumstances. This sweeping contention finds no support in constitutional history, and it does not square with the decisions of the Court.[18]

A. There Is No Constitutional or Historical Basis for Absolute Presidential Immunity

There is no direct evidence that the Framers intended the President to be absolutely immune from civil suit. Had they so intended, they could have expressly provided for executive immunity, as they did for legislative immunity in the Speech or Debate Clause. U.S. Const. art. 1, § 6. "[T]he necessity of considering what privileges ought to be allowed to the Executive" was suggested to the Constitutional Convention by James Madison.[19] But the Constitution is silent on executive immunity.

The Constitution's silence on the point was not inadvertent. James Wilson, who has been credited with the design of the Presidency, *see* Nixon Brief at 24 n.10, told the Pennsylvania ratifying convention that the President was deliberately given no privileges by the Constitution:

> [T]hat officer is placed high, and is possessed of power far from being contemptible, yet not a single

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[18] If the Court rejects absolute immunity, it need not consider the scope of qualified immunity that is appropriate in this case. Not only was that issue not before the court of appeals, but its determination "will necessarily be related to facts as yet not established . . . ." *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

[19] 2 M. Farrand, *The Records of the Federal Convention of 1787* at 503 (1937).

> privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.[20]

Wilson rebutted the contention that the proposed Constitution created an artistocratic government, saying:

> What peculiar rights have been reserved to any class of men, on any occasion? Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? Is there a single distinction attached to him, in this system, more than there is to the lowest officer in the republic? . . . Far, far other is the genius of this system.[21]

Against the evidence of the intent of the Framers to deny the President the attributes and privileges of the English monarch,[22] petitioner Nixon cites only discussions of the means by which the Framers intended to ensure the *political* accountability of the President: elections, impeachment, and the separation of powers. But neither these means nor criminal prosecution were regarded as remedies for wrongs done to an individual. Impeachment, for example, was directed at offenses that "relate chiefly

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[20] 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836) (emphasis in original omitted).

[21] *Id.* at 523.

[22] Charles Pinckney, who had been a delegate to the Constitutional Convention, told the Senate in 1800 that the Framers were careful to restrict privileges:

> The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

Annals of Cong., 6th Cong. 74 (1800).

to injuries done immediately to society itself."[23] As Governor Johnston told the North Carolina ratifying convention:

> [I]mpeachment is very different in its nature from what the learned gentleman . . . supposes it to be. If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment . . . is a mode of trial pointed out for great misdemeanors against the public.[24]

The inclusion in the Constitution of provisions governing impeachment, removal, and subsequent criminal prosecution of the President, Vice President, and other civil officers lends no support to Mr. Nixon's argument that the Framers intended to immunize the President from private civil actions.

In the state ratifying conventions, it was recognized that federal officers would be amenable to private civil actions. Richard Dobbs Spaight, who had been a delegate to the Philadelphia convention, told the North Carolina convention:

> [I]t was very certain and clear that, if any man was injured by an officer of the United States, he could get redress by a suit at law.[25]

Similarly, Mr. Maclaine said:

> The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong in-

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[23] *The Federalist* No. 65 at 423-24 (Modern Library ed.) (A. Hamilton). *See also, e.g.*, 4 Elliot's Debates 113 (Iredell).

[24] 4 Elliot's Debates 48 (emphasis in original omitted). Johnston was responding to the argument, analogous to petitioner Nixon's contention, that impeachment is the sole remedy for wrongdoing by federal officers against individuals.

[25] *Id.* at 37.

> structions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law.[26]

The statements made in the course of framing and ratifying the Constitution do not support Nixon's position. Nor do the observations of John Adams and Oliver Ellsworth in the First Congress that Nixon cites. Nixon Brief at 26. These observations, as reported by William Maclay, addressed a question that is not before the Court in this case: namely, whether an *incumbent* President is amenable to process in a civil suit. Adams' and Ellsworth's views on this question were far from universally shared. Senator Maclay himself disagreed strongly. He characterized their observations as "only part of their old system of giving the President, as far as possible, every appendage of royalty." [27]

The executive branch in the 1830's recognized the President's liability for damages in civil actions. In 1834, President Andrew Jackson protested to the Senate that its censure of him for removing the Secretary of the Treasury had no constitutional basis. Jackson listed "the proper and only modes in which the President of the United States is to be held accountable for his official conduct." Among them, according to President Jackson:

> [The President] is . . . liable to the private action of any party who may have been injured by his illegal mandates or instructions in the same manner and to the same extent as the humblest functionary.[28]

Attorney General Butler, arguing on behalf of the Postmaster General in the late 1830's, told the Court:

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[26] *Id.* at 47. *See also id.* at 37 (Iredell); 3 Elliot's Debates 524-25 (George Mason), 554-55 (John Marshall).

[27] W. Maclay, *Sketches of Debate in the First Senate of the United States, 1789-'91* at 151 (1880).

[28] 3 J. Richardson, *Messages and Papers of the Presidents* 1288, 1290-1291 (1897).

> [W]henever the president takes an active part in an illegal action, to the injury of an individual, though it be done by the hand of his subordinate, he will be responsible in a civil suit, along with that subordinate
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> . . . .

Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 599-600 (1838); *see also id.* at 600, 604.

Mr. Nixon's countervailing citation from the 1830's, like his other authorities, concerns the amenability of an incumbent President to process in a civil suit. The "official inviolability" that Justice Story referred to in his *Commentaries* was, by its own terms, limited to acts—arrest, imprisonment, and detention—that would obstruct or impede the President "while he is in the discharge of his duties of his office."[29] Neither Story nor any other source cited by Mr. Nixon supports the proposition that a former President, when out of office, is immune from civil liability for his acts while President.

The distinction between an incumbent and a former President is important. It was recognized at the time the Constitution was ratified.[30] And it was strenuously argued to this Court in 1867. Attorney General Stanbery then asserted on behalf of President Andrew Johnson that the President "is above the process of any court to bring him to account as President." But Stanbery acknowledged that this immunity ended with the President's removal from office. When "he no longer stands as the representative of the government," Stanbery said,

> then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

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[29] 3 J. Story, *Commentaries on the Constitution of the United States* § 1563 at 419 (1833 ed.), *quoted in* Nixon Brief at 25.

[30] *See* 4 Elliot's Debates 37 (Johnston), 293 (Barnwell).

Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 485 (1867).[31]

Petitioner Nixon relies on the lack of suits for damages against the President to support his contention that the President was understood to be immune. Nixon Brief at 26-27. But history reflects no such understanding. In 1811, a celebrated suit for damages was brought against a former President. The suit, a trespass action against Thomas Jefferson, was dismissed because it had been brought in the wrong district. *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8, 411).[32] Significantly, however, Jefferson made a claim much more like qualified than absolute immunity. In addition to raising the jurisdictional question, Jefferson asserted as a plea of justification that the act complained of was "done under a law of congress, and in his character of president of the United States, without malice." *Id.* at 661.

Rather than being the exception that proves the existence of a "general understanding," *Livingston v. Jefferson* illustrates a more probable reason for the absence of suits against the President: the difficulty of obtaining jurisdiction or proper venue against him. Through the nineteenth century, a suit could be brought against the incumbent President only in the nation's capital and against a former President only where he resided.[33]

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[31] After having served as President, William Howard Taft wrote in 1916 that, although the President "does have an official freedom as President from judicial process that is not unlike that royal prerogative in certain aspects," it "can not be said that he enjoys the royal prerogative in being above liability for a personal suit." Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 Yale L.J. 599, 603-04 (1916).

[32] The action was brought in Virginia, where Jefferson resided, although it alleged trespass under Jefferson's orders on land in Louisiana territory. The circuit court dismissed the suit because, while it was an *in personam* action, it was local in character.

[33] *See generally* 1 Moore's Federal Practice ¶¶ 0.141 [2-1], 0.142 [2-3]. Before 1962, a legal fiction provided that higher ranking

Where suit could more conveniently be brought against a lower official who carried out the President's orders, *see, e.g., Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804); *United States v. Lee*, 106 U.S. 196 (1882), it is not surprising that the President himself was not sued or joined in suit.

Other likely explanations for the scarcity of suits against Presidents and former Presidents include the slow development of the concept of actions in damages for redress of constitutional grievances and the discouraging effect on potential plaintiffs of *Spalding v. Vilas*, 161 U.S. 483 (1896),[34] and subsequent cases. Whatever the explanation, the lack of past suits is clearly not dispositive of the question before the Court.

B. The Decisions of the Court Do Not Support Absolute Presidential Immunity

The development of the doctrine of official immunity in recent years began with suits against state officials under 42 U.S.C. § 1983. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court held that state executive officials —including the governor—do not have absolute immunity in damage actions under section 1983. The *Scheuer* case, arising out of the events at Kent State University on May 4, 1970, illustrated the need for executive officers to act swiftly and decisively in some circumstances. The Court nonetheless unanimously decided that absolute immunity was not required to enable these officials to carry out their duties. "[I]n varying scope," Chief Justice Burger wrote for the Court, "a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

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federal officers resided only where they were stationed, usually the District of Columbia. Joining them as defendants in a suit against a lower ranking officer required bringing the suit in the District. *See Stafford v. Briggs*, 444 U.S. 527, 534 (1980).

[34] *See* discussion at p. 35 *infra*.

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time . . . ." *Id.* at 247. While qualified immunity was justified by the policies of protecting executive officials against the hazards of litigation and promoting the public interest in effective decision-making, the Court recognized that "§ 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict . . . .'" *Id.* at 248.

In *Butz v. Economou*, 438 U.S. 478 (1978), the issue was whether in an action under the Constitution, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), federal executive officers were absolutely immune. The Court found the relevant precedents to be the cases concerning the immunity of state officials under section 1983. 438 U.S. at 496. It concluded that "there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983." *Id.* at 500. A grant of absolute immunity to all federal executive officials exercising discretion, the Court reasoned, would vitiate the cause of action authorized in *Bivens*. *Id.* at 505. Nor would it help to limit absolute immunity to a few officials at the top of the government hierarchy. "The broad authority possessed by these officials," the Court said, "enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests as liberty, property, and free speech." *Id.* It would make little sense, the Court observed, to hold the agent liable and excuse the transgressions of the principal:

> [T]he greater power of [high] officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In

> situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Id. at 506. The Court held that, in *Bivens*-type actions, "federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507.

The message of the cases is plain. Absolute immunity is not a privilege of rank o. a badge of high office. The lowest-ranking local district attorney, when performing a prosecutorial function, is granted a greater degree of immunity than the highest elective official in the state. *Compare Imbler v. Pachtman*, 424 U.S. 409 (1976), *with Scheuer v. Rhodes*, 416 U.S. 232 (1974). The guiding factor in deciding whether absolute immunity is necessary is the nature of the function for which immunity is sought.

Some decision-making processes—such as those of the judge or prosecutor—are particularly vulnerable to the hazards and distractions of collateral civil liability. In judicial proceedings, moreover, procedural safeguards and the appellate process ensure that deliberate constitutional violations will be minimized. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967). In view of these considerations, and of the long-established common law rule, the Court has recognized an absolute immunity shielding the official functions of judges and prosecutors from liability. Similarly, history has taught that the legislative functions protected by the Speech or Debate Clause must be insulated from liability to prevent the other branches from exercising an unduly inhibiting power over the deliberative processes of the legislative branch. *E.g.*, *United States v. Johnson*, 383 U.S. 169, 177-180 (1966). Legislators are "immune from deterrents to the uninhibited discharge of their legislative duty, not for their

private indulgence but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

No similar rationale can justify a grant of *ex officio* absolute immunity to an executive official, whether state or federal. When an executive official violates the constitutional rights of a private citizen, he enjoys a qualified immunity only, unless he can demonstrate in an exceptional situation that absolute immunity is essential. *Butz v. Economou*, 438 U.S. 478 (1978).

The Court has recognized that governors, Cabinet officers, and other officials with broad responsibilities must not be paralyzed by the fear that a mere mistake of judgment will lead to a costly damage award against them. The qualified immunity established in *Scheuer* and *Butz* is designed to provide assurance that honest errors will not be penalized. "Yet," as the Court said in *Butz*, "*Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 438 U.S. at 506-07.

The rationale of the Court's decisions in *Scheuer* and *Butz* applies to the President. His position is analogous to that of a state governor.[35] Cabinet officers answer to the President and act, in many instances, at his direction. Under the rationale of *Butz*, the President should not be granted absolute immunity for actions for which these officials would not be absolutely immune.

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[35] In *The Federalist* No. 69, Hamilton compared the proposed presidential office to that of the governor of New York. *See also* E. Corwin, *The President: Office and Powers* 7 & n.10 (4th ed. 1957) (New York governorship a model for federal Presidency). Chief Justice Marshall observed that, with respect to his personal dignity and his amenability to court process, "the first magistrate of the Union may . . . properly be likened to the first magistrate of a state . . . ." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d).

In upholding the district court's determination in this case that Mr. Nixon is not entitled to absolute immunity, the Court need not foreclose the possibility of extending absolute immunity to the President, or any other federal executive officer, in exceptional situations where civil liability would interfere with the conduct of the public business. But if the civil disturbance at Kent State University was not such an exceptional situation for the governor of Ohio, *see Scheuer v. Rhodes*, surely this case does not involve an exceptional situation for the President.

Nothing in the Court's decisions to date supports, or even suggests, an absolute immunity as broad and inflexible as that proposed by petitioner Nixon. It follows that petitioners Harlow and Butterfield are not entitled to absolute immunity merely because they stood in the shadow of the Presidency. However much the position of presidential assistant may have grown in public attention and importance in modern times, and however useful his aides may be to the President, there can be no justification for granting them a higher degree of immunity than a Cabinet officer would be accorded in the same situation. Indeed, petitioners' novel and ahistorical assertion of "derivative immunity," *see* Harlow/Butterfield Brief at 28-30, amounts to suggesting that a Henry Kissinger or a James Schlesinger enjoys an absolute immunity while serving in the White House, but forfeits this immunity when he assumes the greater responsibilities of a Cabinet office. Surely this cannot be the law.

II. PUBLIC POLICY DOES NOT REQUIRE ABSOLUTE PRESIDENTIAL IMMUNITY

In *Butz v. Economou*, 438 U.S. at 506, the Court stated that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." Petitioner Nixon devotes a

substantial portion of his brief to an attempt to meet this burden. Nixon Brief at 28-44. He has not done so.

Petitioner Nixon's arguments obscure a crucial fact about the lawsuit at issue in this case. It was not brought against an incumbent President. Mr. Nixon was named as a defendant in July 1978, nearly four years after he resigned as President.[36] Whatever drain on his time and resources the suit has caused occurred long after he left office; it had no effect on his performance of public duties. Mr. Nixon is reduced to arguing that a suit against him for his actions while in office will have an inhibiting effect on the conduct of the Presidency by his successors. He offers not a whit of evidence that suits against him have affected the functioning of the office under President Ford, President Carter, or President Reagan.

Mr. Nixon does not present a case in which "the reasons for absolute immunity apply with full force." *Imbler v. Pachtman*, 424 U.S. at 430. Instead, he advances two policy arguments, both of which are conjectural. First, he suggests that amenability to suit disrupts the Presidency by distracting the Chief Executive from his important duties. Second, he claims that the threat of suit will inhibit the President, preventing the fearless and vigorous performance of his duties and distorting his decisions. Qualified immunity does not solve these problems, he contends, because it does not sufficiently alleviate the burdens of discovery and trial. Indeed, Mr. Nixon goes so far as to argue that, if denied immunity at the out-

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[36] The district court has held that respondent acted diligently "in ferreting out [Nixon's] involvement," finding that "the trail to the highest office in the land was murky and the White House continued to conceal." Memorandum Regarding Statute of Limitations (March 26, 1980), *reprinted in* Nixon Cert. Petition at 6a, 8a, 10a.

set, the President or a former President may not receive a fair trial from a lay jury.[37]

Petitioner Nixon portrays the White House lawn aswarm with process-servers, bearing summonses in civil damage actions brought by his political foes, publicity-seekers, and "self-chosen 'private attorney generals.'" Nixon Brief at 31-33, 41. It is improbable in the extreme that political opponents will bring *damage* actions to thwart the President or his policies, given the expense and hazards of litigation and the availability of qualified immunity. Politically motivated litigants are far more likely to seek equitable relief than damages, and Mr. Nixon himself is not contending that the President is shielded from injunctive remedies. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Damage suits against the President for injuries with which he had only tangential involvement are unlikely to survive to trial. *See Rizzo v. Goode*, 423 U.S. 362 (1976). Where there is no injury at all—as in the case of a suit by a "self-chosen 'private attorney general'"—it is difficult to see how the suit could survive a motion to dismiss.

Mr. Nixon fails to explain why qualified immunity is not a sufficient answer to his concerns about the President's alleged susceptibility to suit. Governors have not been subjected to a flood of frivolous or misguided lawsuits since the Court decided *Scheuer v. Rhodes*, nor have high executive branch officials since the Court decided *Butz v. Economou*. These officials are also highly visible, and their actions are frequently controversial. Moreover, qualified immunity of the type accorded by *Scheuer* and *Butz* is not as empty a defense as Mr. Nixon suggests. It will almost certainly shield the President from trial

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[37] Mr. Nixon also suggests that there will be disruption of the Presidency in the second degree, with "other Presidents"—by which he presumably means other former Presidents and perhaps the incumbent—being called upon to testify as to the reasonableness of the defendant's action. Nixon Brief at 42 n.18.

for actions he takes that are grounded upon legal advice —advice that he is readily able to obtain and generally does. The fearless performance of presidential duties that the law ought to foster does not extend to actions the President should know violate the Constitution and statutes and that he undertakes with the malicious intent of violating the rights of an individual.

Mr. Nixon offers no reason why a former President, uniquely among citizens, should be spared the "burdens of modern litigation." As the Court recently stated, "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980), *quoting Petroleum Exploration, Inc. v. PSC*, 304 U.S. 209, 222 (1938). "[T]he way to minimize the burdens of litigation does not generally lie through abolition of a right of redress of an admitted wrong." *Barr v. Matteo*, 360 U.S. 564, 589 (1959) (Brennan, J., dissenting). The Court does not make decisions regarding the reach of constitutional protections, even for those whose "task . . . is indispensable in a system such as ours," on the basis of the costs of defending damage actions. *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (press protection from libel actions).

The burdens of litigation are not as onerous for the President or a former President as petitioner claims. With respect to the incumbent, the district court can stay all proceedings until he leaves office. Contrary to Nixon's assertion, a stay is likely to be at least as detrimental to the plaintiff's case as to the defendant's, since the defendant will have notice of the claim and an opportunity to prepare a defense in the interim. In civil litigation generally, it is defendants, not plaintiffs, who are thought to benefit from delay.

Mr. Nixon's contentions about the burdens of discovery are similarly wide of the mark. His characterization of discovery in this case omits to mention, for example, that Mr. Nixon's second deposition, as well as

the depositions of Haig, Kissinger, Laird, Schlesinger, and others, were taken at the instance of defendants, not the plaintiff. Moreover, he fails to credit the ability of the district courts to issue appropriate protective orders concerning the timing, order, and scope of discovery to limit the burden of defending those few suits that survive a motion to dismiss or for summary judgment. Fed. R. Civ. P. 26(c); *see Herbert v. Lando*, 441 U.S. at 177. While the burdens of discovery for any defendant are not to be underestimated, surely they are not a sufficient reason for according absolute immunity to the President.

Mr. Nixon's concerns about the fate of a former President or the incumbent President before a lay jury are also exaggerated. Most citizens are well aware of the difficulties a President faces, the vast scale of his responsibilities, and the great import of the problems he must address. Even those who disagree with his political philosophy or his decisions are likely to presume that the President is a man of personal integrity, honesty, and good will. The typical jury is likely to be an asset, not an obstacle to a President; any plaintiff will have difficulty persuading a jury that the Chief Executive maliciously violated the plaintiff's individual rights.

The thread that connects all of Nixon's arguments is the contention that qualified immunity is inadequate for the President because it is not a talisman that may be invoked to ward off all trials.[38] The Court has rejected petitioner's argument before. In *Butz*, the Court stated that qualified immunity "should prove as workable in suits against federal officials as it has in the context of

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[38] Harlow and Butterfield, who make the same point from the perspective of presidential advisers, also attack the district court's denial of their motion for summary judgment on the qualified immunity issue. Harlow/Butterfield Brief at 43-44. This portion of the district court's order was not appealed by petitioners, nor was it collaterally appealable. *Forsyth v. Kleindienst*, 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 3147 (1981).

suits against state officials." 438 U.S. at 507. The Court went on to say:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, . . . damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harrassed by frivolous lawsuits.

Id. at 507-08 (citation and footnote omitted). There is no reason to assume that the Court's admonition has gone unheeded or that qualified immunity is less workable for the President and his advisers than it has proved in suits against state officers and other federal officers.[39]

Petitioner Nixon acknowledges that absolute immunity for the President will sacrifice the interests of individual plaintiffs, but contends that the sacrifice is bearable because individual rights are safeguarded by other judicial and administrative remedies, by the impeachment process, and by the President's political accountability. Nixon

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[39] Petitioners Harlow and Butterfield put forward as a panacea for the alleged deficiencies of the qualified immunity standard Judge Gesell's suggestion in his concurring opinion in *Halperin v. Kissinger*, 606 F.2d 1192, 1215 (D.C. Cir. 1979), *aff'd by an equally divided Court*, 101 S. Ct. 3132 (1981), that the plaintiff be required to prove malice in pretrial proceedings "by the preponderance of the evidence or through clear and convincing evidence." Harlow/Butterfield Brief at 44-47. Serious seventh amendment problems would be raised by the application of a higher evidentiary standard at the pretrial stage than at a jury trial. In any event, this special standard would not have availed petitioners, since the evidence of malice in this case is substantial. *See, e.g.*, JA 183a, 282a.

Brief at 39-41. Violation of the rights of one individual is unlikely to turn an election—and, indeed, Mr. Nixon was reelected in 1972 after Fitzgerald was fired. Nor is it likely to set in motion the machinery of impeachment. And the political accountability of the President is attenuated, at best, when his involvement in an action is concealed until after he has left office. For individuals in Fitzgerald's shoes, there is no adequate substitute for money damages. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971); *see also* discussion at pp. 43-44 *infra*.

In the end, Mr. Nixon is contending that the balance between the public's interest in the effective functioning of the Presidency and the rights of individual plaintiffs weighs in favor of absolute immunity. But he offers little for his side of the scale. His sweeping hypotheses finally reduce to the simple assertion that the President will be cowed in the performance of his duties by the prospect of defending damage actions for maliciously violating individual rights. Surely that prospect is not so awesome, nor our Presidents so irresolute, as Mr. Nixon portrays them. The balance—for Presidents as for governors, for presidential advisers as for Cabinet officers—as this Court has held, favors qualified, not absolute immunity.

III. ABSOLUTE PRESIDENTIAL IMMUNITY IS NOT REQUIRED OR JUSTIFIED BY THE PRINCIPLE OF SEPARATION OF POWERS

Mr. Nixon argues that absolute immunity is essential to preserve the separation of powers and prevent judicial review of presidential motives, thought processes, and communications. Nixon Brief at 44-46. This is basically the same separation of powers argument presented by Nixon twice before and twice rejected by the Court. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 638, 707 (1974).

Mr. Nixon has not shown that the essential functions of the executive branch would be undermined by limiting the President to qualified immunity. More important, as this case illustrates, the essential functions of the other two branches of government would suffer if the President were absolutely immune.

The impact of absolute presidential immunity on the judicial branch is obvious. The federal courts have long played a significant role in deterring constitutional violations by government officials and in vindicating individual rights. *See Davis v. Passman*, 442 U.S. 228, 242 (1979); *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978). As the Court stated in *Butz v. Economou*, 438 U.S. at 505:

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.

See also Halperin v. Kissinger, 606 F.2d at 1212-13.

This case plainly demonstrates that absolute presidential immunity can interfere even more drastically with the essential functioning of Congress. Ernest Fitzgerald was fired because he testified truthfully and honestly before a congressional committee gathering information about an important matter of public policy. This Court has long recognized that investigation and information gathering are essential parts of the legislative function. *See Nixon v. Administrator*, 433 U.S. at 498-99 (Powell, J., concurring in part and dissenting in part); *Tenney v. Brandhove*, 341 U.S. at 377. Without information on the internal workings of the executive branch, Congress cannot properly exercise its oversight function. *See Barr v. Matteo*, 360 U.S. at 576-78 (Black, J., concurring). To protect its access to information as well as to protect the rights of federal employees, Congress conferred upon them the right "to furnish information to either House of Congress" without interference. 5 U.S.C. § 7211. Con-

gress has also made it a felony to retaliate against a witness because of his testimony. 18 U.S.C. § 1505.[40] Meaningful enforcement of these rights requires that individual plaintiffs be able to seek damages for their violation. Any disruption resulting from granting the President only qualified immunity for violations of these statutes is plainly "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator*, 433 U.S. at 443.

By contrast, denying the President absolute immunity has minimal impact on the executive branch. Civil damage suits against a former President are surely far less intrusive on the presidential office than judicial orders commanding or restraining executive actions. Yet the latter are unquestionably permissible.[41] Moreover, Mr. Nixon exaggerates the extent to which conversations with presidential advisers need be revealed.[42] Many presidential communications will not be probative of qualified immunity issues. For those that are, the trial court

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[40] As a Senator, Mr. Nixon sponsored a proposed amendment to this law that would have created a presumption that adverse personnel actions against a congressional witness within one year of his testimony were retaliatory. *See* S. Rep. No. 414, 82d Cong., 1st Sess. 3 (1951). Senator Nixon said in support of his amendment, "Unless protection is given to witnesses who are members of the armed services or employees of the Government, the scheduled hearings will amount to no more than a parade of yes men for administration policies as they exist." 97 Cong. Rec. 4393-94 (1951).

[41] *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (injunction); *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena *duces tecum* in criminal case); *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (mandamus).

[42] Nixon mistakenly characterizes the "ultimate issue" in cases like this as "what the President 'knew or should have known.'" Nixon Brief at 46. What the President knew or should have known forms the objective portion of the qualified immunity standard; it relates only to the state of the law when the President acted, not his confidential communications.

must weigh the public interest in maintaining confidentiality—an interest that diminishes the longer a former President is out of office—against the public interest in providing a remedy for individuals whose rights have allegedly been violated. Furthermore, the court may restrict the use during pretrial proceedings of materials whose production is required, strictly limiting their copying and dissemination. Although the allocation of the burden of persuasion on a claim of qualified immunity is not yet fully established, a defendant President need not be penalized because the public interest requires that communications involving him remain confidential.[43]

The principle of separation of powers, far from supporting absolute presidential immunity, dictates that the President be granted qualified immunity only. Congress cannot function effectively if its sources of information about the activities of the executive branch are subject to an unrestrained power of presidential removal. The courts cannot fully perform their function of vindicating individual rights if the President can trample these rights at will. Qualified immunity no more prevents the President from performing his important functions than it does governors and Cabinet officials.

IV. PETITIONERS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY BECAUSE THEY HAVE NOT ESTABLISHED THAT THEY ACTED WITHIN THE SCOPE OF THEIR AUTHORITY

Even if the Court, in a sharp break with its recent precedents, should adopt absolute immunity for constitutional and statutory violations by a former President and his assistants, summary judgment cannot be entered for petitioners because they have not established that they acted within the scope of their authority. The dis-

[43] The risk that litigation might compromise privileged confidential material may itself necessitate dismissal of a plaintiff's claims. *See Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam) (state secrets privilege).

trict court ruled that "[g]enuine issues of fact remain as to the scope of each defendant's responsibilities" and therefore none of them had shown that "he was acting 'within the outer perimeter' of his responsibilities . . . ." *Fitzgerald v. Butterfield*, Civ. No. 74-178 (D.D.C. Mar. 26, 1980), *reprinted in* Nixon Cert. Petition, App. at 2a-3a. While the district court made this ruling in connection with petitioners' claims of qualified immunity, it is also dispositive of their claims of absolute immunity, were such immunity otherwise available.

A. The Absolute Immunity Sought by Petitioners Should Not Apply to Conduct Outside the Scope of Their Authority

Historically, federal executive officials enjoyed absolute immunity from damage suits under state statutory or common law for actions within the scope of their authority. *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896). This immunity was "not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Matteo*, 360 U.S. at 572-73. The Court limited the scope of immunity to conduct relating to " 'matters committed by law to [the official's] control or supervision.' " *Id.* at 573-74, *quoting Spalding v. Vilas*, 161 U.S. at 498. Where executive officials acted without authority, they had no immunity whatever. *Bates v. Clark*, 95 U.S. 204 (1877); *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804).

In *Butz v. Economou*, 438 U.S. 478 (1978), the Court recognized a form of immunity for federal executive officials that is broader but less protective than traditional absolute immunity. Under *Butz*, executive officials are accorded qualified immunity—varying in application according to the nature and circumstances of the challenged action—for conduct that is alleged to violate the Constitution. This conduct would not have been protected at all under traditional principles. "*Barr* did not purport

to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution." *Id.* at 495 (footnote omitted).

Butz did not specify whether qualified immunity is limited by a requirement that the official claiming immunity was acting within the scope of his authority. The opinion suggests, however, that the scope of authority of the official is one of the factors to be weighed in determining the degree of immunity available. The qualified immunity test set forth in *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), and adopted for federal executive officials in *Butz*, provides:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the *scope of discretion and responsibilities of the office* and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

438 U.S. at 497 (emphasis added). Thus, qualified immunity, while variable, is still limited by the scope of the official's discretion and responsibilities.

Petitioner Nixon, and petitioners Harlow and Butterfield as well, argue that they should be absolutely immune not merely in the traditional sense—for common law torts committed within the scope of their authority—but rather for all actions while in office. An immunity of this reach cannot be justified. Any official immunity must be limited in its applicability.[44] Traditionally, this

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[44] Thus, in the case of judges, official immunity is limited to judicial acts; judges lose their absolute immunity if they act in the "clear absence of all jurisdiction." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871); *see Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). *See also Gregory v. Thompson*, 500 F.2d 59, 63-64 (9th Cir. 1974); *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970). The immunity of prosecutors and legislators is similarly

limit was provided by the scope of authority test. *See Barr v. Matteo*, 360 U.S. at 573-74. Under *Butz*, the limit was made a part of the qualified immunity test itself. But under the doctrine advanced by petitioners, there would be no limit. Any action that the President, or his aides, took under color of office would be absolutely immunized, even "actions manifestly beyond their line of duty." *Butz v. Economou*, 438 U.S. at 495.

If the Court adopts absolute immunity for the President, this immunity should be limited to actions that relate to "matters committed by law to his control or supervision." *Spalding v. Vilas*, 161 U.S. at 498. The Court should adopt Judge Learned Hand's formulation in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), and hold that the President, like any other officer, is acting within his power only when the occasion is "such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." Where the President purports to exercise power that he does not possess, he should not have the same immunity that applies to powers that are "vested in him."

B. In Ordering the Firing of Fitzgerald, Petitioner Nixon Did Not Act Within the Scope of His Authority

Mr. Nixon himself described the action he took in this case. He stated publicly, while President, that the Fitzgerald firing was "not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it." JA 185a. He stated privately that he ordered Secretary Seamans to "get rid of that son of a bitch" as a specific response to Fitzgerald's congressional testimony. JA 214a-215a.

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limited. *See Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (prosecutors); *Doe v. McMillan*, 412 U.S. 306, 324 (1973) (legislators); *United States v. Brewster*, 408 U.S. 501, 514 (1972) (same).

In taking this action, he was outside the scope of the President's historical and legal authority.

The scope of authority of the President is very broad, particularly in such fields as foreign affairs, *see, e.g., Dames & Moore v. Regan*, 101 S. Ct. 2972 (1981), and the command of the armed forces, *see, e.g., Madsen v. Kinsella*, 343 U.S. 341, 348 (1952). But the powers of the President are not unbounded. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In particular, the President's authority to remove subordinate federal officers is subject to well-defined limits.

The Constitution provides two methods for the statutory appointment of inferior officers. Congress may leave their appointment to the President, either alone or by and with the advice and consent of the Senate, or it may vest the appointing power "in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Whether the President is authorized to remove these officers depends upon which method Congress adopts.

Where the President appoints an officer, Congress cannot restrict his removal authority unless the official exercises quasi-legislative or quasi-judicial functions that are insulated from presidential control. *See Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). But where Congress vests the appointment power in the head of an executive department, Congress may validly limit the conditions under which the officer can be removed. *United States v. Perkins*, 116 U.S. 483 (1886); *see Myers v. United States*, 272 U.S. 52, 127 (1926) (Congress has "the power to limit and regulate removal of . . . inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them"); *National Treasury Employees Union v. Reagan*, No. 81-1294 (D.C. Cir. August 11, 1981).

The power to appoint to Mr. Fitzgerald's job was vested in the Secretary of the Air Force. 10 U.S.C.

§ 8012(e); 5 C.F.R. § 213.3109. Congress had the power to limit, and did limit, the conditions under which Fitzgerald could be removed. Because he is a veteran, Fitzgerald could be removed from his job "only for such cause as will promote the efficiency of the service." Veterans' Preference Act, 5 U.S.C. § 7512(a); *see also* 5 C.F.R. § 752.201 *et seq.* As the court of appeals found, Fitzgerald had been accorded legislative protection. *Fitzgerald v. Hampton*, 467 F.2d 755, 762 (D.C. Cir. 1972). Once Congress had extended this protection, no federal official had authority to discharge Fitzgerald summarily. The President could no more ignore this legislative protection than could any other official of the executive branch. *See Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Roth v. Brownell*, 215 F.2d 500, 501 (D.C. Cir.), *cert. denied*, 348 U.S. 863 (1954).

Mr. Nixon asserts that as President he had authority to " 'prescribe' the manner in which Secretary Seamans would 'conduct the business of the Department [of the Air Force],' 10 U.S.C. § 8012(b)." Nixon Brief at 49. From this, he concludes that his order to fire Fitzgerald was authorized by statute.

The argument has a critical flaw. Secretary Seamans did not have the authority to discharge Fitzgerald summarily. The "reorganization" by which he purported to do so was a sham.[45] Unless the President's authority under 10 U.S.C. § 8012(b) to "prescribe" the manner in which the Secretary "conduct[s] the business" of the Air

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[45] The "reorganization" to remove Fitzgerald may have had its genesis when the Chairman of the Civil Service Commission advised Secretary Seamans that the "only alternative is to abolish his job." JA 205a. The CSC hearing examiner ruled that the "reorganization" was "influenced by, and resulted from, reasons that were personal to [Fitzgerald]" and therefore concluded that it was "improper, inappropriate and contrary to the spirit, intent, and letter of the Commission regulations." *CSC Decision, supra* note 6, at 20. Even Mr. Nixon recognized that the Fitzgerald firing had nothing to do with a neutral reorganization, but rather resulted from his "complaining about the overruns . . . in public." JA 221a.

Force includes the power to authorize unlawful actions by the Secretary, petitioner Nixon's argument fails.

Surely Congress did not intend section 8012(b) to authorize unlawful conduct. The provision itself speaks of the Secretary's authority in terms of such "activities as may be prescribed by the President or the Secretary of Defense *as authorized by law.*" (emphasis added) Far from being the grant of authority to the President that petitioner Nixon posits, section 8012(b) merely recognizes that the President may prescribe the actions of the Secretary as permitted by law. It does not authorize the President to direct the Secretary in the absence of law—and certainly not contrary to law.

Mr. Nixon's order to the Secretary of the Air Force to "get rid of" Fitzgerald was "manifestly and palpably" beyond the scope of his authority. *Spalding v. Vilas*, 161 U.S. at 498. Petitioner errs in suggesting, Nixon Brief at 48, that this determination collapses into the merits of the lawsuit. The scope of Mr. Nixon's authority did not depend upon his motive in ordering the firing. The President does not have the authority summarily to remove subordinate officers he did not appoint, and, as President, Nixon did not have the power summarily to remove Fitzgerald—for any purpose. As the district court concluded in response to one of Mr. Nixon's earlier motions for summary judgment, "By statute and regulation, the President had no authority to hire, discharge, or interfere with the employment of an employee such as Fitzgerald." JA 57a. Accordingly, petitioner Nixon is not entitled to absolute immunity in this case.

C. Petitioners Harlow and Butterfield Have Also Not Established that They Acted Within the Scope of Their Authority

The record supports the district court's finding that "genuine issues of fact" exist as to the scope of authority of petitioners Harlow and Butterfield. These two petitioners make virtually no attempt in their joint brief to

establish that their alleged actions related to "matters committed by law to their control or supervision." Without this essential element, their claim of immunity cannot prevail.

The record shows that Harlow was a congressional liaison aide and counsellor to the President. As such, he had no regular involvement in executive department personnel decisions. At his deposition, Harlow admitted that "Mr. Fitzgerald was not my wicket. I was charged with other matters." Harlow Dep. (R. 392) at 181. *See also* Schlesinger Dep. (R. 432) at 28. Butterfield was even further outside the perimeter of his White House duties. As he recalled in a 1973 interview, his role "was almost purely administrative" and did not include "advis[ing] Haldeman on anything." JA 297a. His "let him bleed" memorandum, allegedly sent to Haldeman and others in the White House to prepare for a press conference, was later described by Butterfield as having been done "not in any official way at all." *Id.* The testimony of other White House officials confirms that Butterfield was, as Ziegler described him, a mere "paper flow guy" who "would [not] have prepared substantive matters for a press conference." JA 175-176a. *See also* JA 108a. Official immunity should not shield these petitioners from liability for acts committed outside the perimeter of their official duties.

V. RESPONDENT FITZGERALD HAS PROPERLY ASSERTED CONSTITUTIONAL AND STATUTORY CAUSES OF ACTION IN THIS CASE

Petitioners Harlow and Butterfield question the district court's rulings that Fitzgerald has an implied private right of action under the first amendment and federal statutes.[46] While the issue has no place in this

[46] Along with Mr. Nixon, they also contend that the district court's decision on absolute immunity was immediately appealable as a collateral order. The court of appeals correctly dismissed petitioners' appeal in view of its decision in *Halperin v. Kissinger*. Respondent concedes, however, that, given this Court's disposition of *Halperin*, 101 S. Ct. 3132 (1981) (affirmance by an equally

proceeding, it is clear that a damages remedy is available in the circumstances of this case.

A. The Implied Cause of Action Issue Is Not Properly Before the Court

The district court's ruling that Fitzgerald has constitutional and implied statutory causes of action was not appealable as a collateral order, *cf. Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), nor was it certified for interlocutory appeal under 28 U.S.C. § 1292(b). The issue was not before the court of appeals. In their petition for a writ of certiorari, Harlow and Butterfield did not present the question for review. Rather, they expressly informed this Court that the issue was not "immediately appealable" and that it was not included in their notices of appeal to the court of apeals. *See* Harlow/Butterfield Cert. Petition at 14 n.9. Rule 34.1(a) of this Court states that a petitioner's brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the petition for certiorari. In light of this rule, and the settled principle against hearing piecemeal interlocutory appeals, the Court should not consider the implied right of action issue.

B. Fitzgerald Is Entitled To Sue Under the First Amendment

Precedent and the expressed will of Congress support Mr. Fitzgerald's constitutional cause of action. Victims of a constitutional violation by a federal officer are entitled to bring suit against the officer for damages even in the absence of a statute expressly creating the cause of action. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Carlson v. Green*, 446 U.S. 14 (1980). *See also Davis v. Passman*, 442 U.S. 228 (1979). The re-

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divided Court), the denial of absolute immunity is now properly before the Court.

taliatory firing of Mr. Fitzgerald clearly violated his first amendment rights of free speech and petition.[47]

In *Bivens*, the Court held that a constitutional cause of action exists except where there are "special factors counselling hesitation in the absence of affirmative action by Congress," 403 U.S. at 396, or where "Congress has provided an alternative remedy which it explicitly declare[s] to be a *substitute* for recovery directly under the Constitution and view[s] as equally effective." *Carlson v. Green*, 446 U.S. at 18-19, *citing Bivens*, 403 U.S. at 397, and *Davis v. Passman*, 442 U.S. at 245-247. Neither exception applies here.

No "special concerns counsel hesitation" in this case. *Davis v. Passman* establishes that such concerns are "coextensive" with the scope of official immunity, there the legislative immunity conferred by the Speech or Debate clause, 442 U.S. at 246; *see Carlson v. Green*, 446 U.S. at 19. The second *Bivens* exception is equally inapplicable. No effective alternative remedy has been expressly provided by Congress. To the contrary, Congress apparently intended that a private right of action should be available to vindicate federal employees' rights in the face of official retaliation for congressional testimony. The partial relief Fitzgerald received as a result of his civil service appeal is not a substitute for *Bivens* damages, nor was it so intended by Congress. The Civil Service Commission was not empowered to grant Fitzgerald compensatory damages (other than back pay), interest on his judgment, or attorney's fees.[48] Fitzgerald's admin-

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[47] *Perry v. Sindermann*, 408 U.S. 593 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960). *See also Branti v. Finkel*, 445 U.S. 507, 514-15 (1980); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[48] Petitioners' claim that Mr. Fitzgerald's administrative remedy was adequate also runs counter to Congress' intent in providing special rights to veterans in federal government. If the administrative remedy were allowed to cut off access to *Bivens* relief, the effect would be to diminish the rights of veterans in comparison

istrative remedy was deficient in at least three further respects: (1) the absence of a deterrent purpose, (2) the unavailability of punitive damages, and (3) the lack of a right to jury trial. *See Carlson v. Green*, 446 U.S. at 20-21.

Petitioners rely heavily on *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3176 (U.S. Sept. 4, 1981) (No. 81-469), in which the plaintiff's government employment was treated as a factor counselling hesitation. *Bush v. Lucas* is distinguishable from this case, since Congress had not expressly prohibited the conduct challenged there. To the extent that *Bush v. Lucas* holds that executive branch personnel decisions are too sensitive to be subject to court review, it was wrongly decided. Those who make personnel decisions "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson v. Green*, 446 U.S. at 19. Executive discretion in the personnel area is broad, but it is not unreviewable.[49]

C. Fitzgerald Has Implied Causes of Action Under Two Federal Statutes

Fitzgerald also has implied causes of action under 5 U.S.C. § 7211 (Supp. III 1979) and 18 U.S.C. § 1505 (1976). Private damage actions for violations of sec-

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with similarly situated nonveterans. But the Veterans' Preference Act was intended to expand the rights of veterans, *see e.g.*, H.R. Rep. No. 1289, 78th Cong., 2d Sess. 2-3 (1944). The statute itself prohibits a construction that would "take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law. . . ." Veterans' Preference Act of 1944, ch. 287, § 18, 58 Stat. 387.

[49] *See, e.g., Service v. Dulles*, 354 U.S. 363 (1957) (reinstatement and back pay action by discharged federal employee); *Daly v. Costle*, No. 79-2533 (D.C. Cir. Aug. 18, 1981) (damage action by federal employee against her superiors individually, alleging harassment because the employee was a Republican); *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981) (same, alleging harassment operating to nullify the due process job protection afforded by civil service law).

tion 7211 are neither directly provided by the statute nor discussed in its legislative history. Congressional silence, however, "is not inevitably inconsistent with an intent on its part to make such a remedy available. . . . Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979) (citation omitted). *Cf. Cort v. Ash*, 422 U.S. 66, 78 (1975). In this case, the intent appears in all three.

First, section 7211 creates rights for the benefit of federal employees, a clearly identified class of persons that includes Fitzgerald. Statutory protection of a specific group that includes the plaintiff, as opposed to legislation for the benefit of the public at large, is a strong indication that Congress intended to create a private remedy in favor of members of the group. *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Petitioners' assertion that section 7211 was designed to protect the legislative process and not the rights of employees, Harlow/Butterfield Brief at 26 n.11, is belied by the provision's legislative history. What is now section 7211 [50] was originally enacted "to protect employees against oppression and in the right of free speech and the right to consult their Representatives." H.R. Rep. No. 388, 62d Cong., 2d Sess. 7 (1912). "Gag rules" that had been imposed by executive order provided the impetus for section 7211's enactment. *See* Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909). In support of the legislation, members of Congress focused on the employees' welfare and interests.[51]

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[50] Post Office Appropriations Act of August 24, 1912, ch. 389, § 6, 37 Stat. 539 ("The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress or any Member thereof, or to furnish information to either House of Congress, or any committee or Member thereof, shall not be denied or interfered with.").

[51] *See, e.g.*, 48 Cong. Rec. 4656 (remarks of Rep. Reilly) ("[The gag rule] has as its name implied, effectually choked these em-

Second, while contemporaneous provision of an alternative remedy is evidence against an intent to create a private right of action, *see Transamerica*, 444 U.S. at 19-20, Congress did not provide an alternative remedy for violation of the rights conferred by section 7211 when it originally enacted the provision in 1912. Criminal sanctions for interference with congressional witnesses were not available until 1940.[52] Not until 1948 was there a provision granting back pay for wrongfully discharged employees in the classified civil service.[53] Most striking, even after the enactment of the predecessor of section 7211, many employees still possessed no statutory protection against discharge or demotion.[54] The absence of an effective remedy is persuasive evidence of congressional intent in 1912 to create a private cause of action under section 7211. Subsequent legislation that provided additional remedies (such as that in 1940 and 1948) was designed to strengthen, not weaken, enforcement of the rights conferred by section 7211. There is no basis for concluding that the subsequent legislation was intended to eliminate an implied cause of action created in 1912.

Third, the circumstances surrounding the enactment of section 7211 strongly suggest that congressional silence

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ployees and tied them hand and foot, and has prevented them from uttering any word of complaint even against the most outrageous treatment that could be heaped upon them."); *id.* at 10728 (remarks of Sen. Reed) ("I prepared the amendment I offered [the predecessor of section 7211] because I wanted at least to preserve *to these men* the right of petition to Congress." (emphasis added)).

[52] *See* Act of Jan. 13, 1940, ch. 1, 54 Stat. 13 (current version codified at 18 U.S.C. § 1505 (1976)).

[53] *See* Act of June 10, 1948, ch. 447, 62 Stat. 354 (current version codified at 5 U.S.C. § 5596(b) (Supp. III 1979)).

[54] Although the original version of section 7211 conferred the right to communicate with Congress on *all* "persons employed in the civil service of the United States," the right to be discharged only for cause and procedural protections to enforce that right were extended only to persons "in the *classified* civil service of the United States." Post Office Appropriation Act of August 24, 1912, ch. 389, § 6, 37 Stat. 539 (emphasis added).

concerning a private cause of action should not be construed to deny its existence. Congress was primarily concerned with sending the executive branch the message that interference with federal employees' communications with Congress would not be tolerated. Had Congress anticipated that the executive branch might ignore this statutory prohibition, it undoubtedly would have provided enforcement to the full extent of existing law. *See, e.g.*, note 51 *supra*.

Finally, section 7211 provides a context that justifies implying a private cause of action under 18 U.S.C. § 1505. *Cf. Cort v. Ash*, 422 U.S. 66, 79-80 (1975) (contrasting a bare criminal statute with criminal statutes that offer "a statutory basis for inferring that a civil cause of action of some sort be in favor of someone").

Petitioners suggest that a cause of action under a federal statute would be unavailing in any event. They erroneously claim that the plurality opinion in *Barr v. Matteo* grants federal executive officials absolute immunity from all except constitutional causes of action and that *Butz v. Economou* confirmed this immunity. *Barr v. Matteo* dealt with a suit under local libel law. As the Court observed in *Butz*, "a quite different question would have been presented had the [defendant] officer ignored an express statutory or constitutional limitation on his authority." 438 U.S. at 489. Although the question presented in *Butz* was limited to official immunity for constitutional torts, 438 U.S. at 495 n. 22, the Court's reasoning applies equally to statutory violations,[55] particularly where a statute was enacted to vindicate the constitutional rights of an expressly defined group that includes the plaintiff.

Section 7211 was intended to nullify certain executive orders and thus to curb presidential abuses of power.

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[55] Indeed, the Court in *Butz* took it to be established law that federal officers are liable "when they stray beyond the plain limits of their statutory authority . . . ," 438 U.S. at 495.

The group protected by section 7211—federal employees —was limited, and the group to whom the mandate of the statute was addressed—the President and subordinate executive officers—was even more sharply circumscribed. When Congress legislates concerning such a limited group of potential defendants, all of them federal officials, it must be held to have abrogated any absolute immunity they might otherwise have enjoyed.

Accordingly, the Court, if it chooses to consider the issue at all, should hold that implied private causes of action against petitioners exist under 5 U.S.C. § 7211 and 18 U.S.C. § 1505 and that Congress limited defendants in actions under these provisions to no more than qualified immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded to the district court.

Respectfully submitted,

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Nos. 79-1738, 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,

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**On Writs Of Certiorari To
The United States Court Of Appeals For
The District Of Columbia Circuit**

REPLY BRIEF FOR PETITIONER RICHARD NIXON

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STATEMENT

The issue of absolute immunity is, of course, broader than the facts of any particular case. It is totally unnecessary for this Court to reach or resolve factual issues contested by the parties in the courts below. Accordingly, only a brief response to Fitzgerald's "Statement" is necessary.

The Statement in Fitzgerald's brief begins with four "basic facts" which, he contends, are "not significantly controverted" (Resp. Br. 2). This presentation is particularly misleading, since it omits the following "basic facts," not controverted at all in Fitzgerald's brief:

1. Secretary Seamans testified under oath and unequivocally that he *alone* issued the order abolishing Fitzgerald's job and was not advised to take this action by Mr. Nixon or anyone acting on his behalf. JA 159a-60a.

2. In December 1969, President Nixon personally asked his chief of staff and the director of the Bureau of the Budget to place Mr. Fitzgerald in that White House organization. *See* Nixon Br., p. 10. (Respondent has never found a satisfactory way of explaining this clear contradiction of his central allegation of a willful conspiracy against him, and thus chooses only to ignore it).

3. On February 1, 1973, the day after Mr. Nixon stated in public that he had ordered Fitzgerald's termination (which had occurred in 1969), the White House issued a retraction, stating in part that "the President did not . . . have put before him the decision regarding Mr. Fitzgerald." JA 196a.

4. Tape-recorded conversations between Mr. Nixon and his aides clearly reflect that Mr. Nixon was "thinking of another guy" (JA 220a) during his press conference, and not Fitzgerald.

Fitzgerald's presentation of the subsidiary facts also confirms dramatically Judge Gesell's prescient observation concerning the means through which skillful plaintiff's counsel may marshall snippets of evidence to overcome summary judgment in cases such as this (*Halperin* v. *Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)):

> It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense.
>
> * * *
>
> A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient.

By way of example only, there are at least four misleading aspects to Fitzgerald's contention that White House tape recordings show that (Resp. Br., p. 6):

> As Mr. Nixon later recalled it, Harlow "was all for canning" Fitzgerald. JA 284a. The Fitzgerald matter was recalled to be "all Harlow's ball game."

This contention (1) obscures the fact that the conversation was one in which Mr. Nixon was directing his press secretary to help Fitzgerald, (2) presents as a stated recollection what was in fact a question by Mr. Nixon as to whether "Bryce was all for canning him," (3) implies that Mr. Nixon, rather than Ziegler, recalled that the Fitzgerald matter was "all Harlow's ball game," and (4) omits any mention of the discussion, three seconds later in the conversation, of efforts to place Fitzgerald in OMB and the fact that Mr. Nixon had erred in his press conference. *See* JA 284a-85a. [1]

Fitzgerald's brief also misportrays Mr. Nixon's recorded conversations with his aides immediately following his 1973 press conference, three years after the relevant events had occurred. Fitzgerald makes little mention of the conversations during which Mr. Nixon discovered he had been mistaken during the press conference (JA 218a, 220a):

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[1] Fitzgerald also asserts that James Schlesinger "recalled that Mr. Nixon referred with disapproval to the 'Fitzgerald kind of thing' " at a meeting on the Manned Orbiting Laboratory (Resp. Br. 5 at n.8). Schlesinger actually "recalled" only a "passing reference" that he "think[s] . . . would have [been] referred to . . . as a Fitzgerald kind of thing" (Schlesinger Dep. (R. 432) 13), and which he could not place in time (*id.* at 32-33, 55). Other participants in the MOL meeting disagreed with Schlesinger's vague account (JA 164a; Mayo Dep. (R. 460) 10-12, 19; Laird Dep. (R. 455) 96-97). Fitzgerald's treatment of documents is no better. His assertion that Patrick Buchanan "endorsed Mollenhoff's view that the Air Force was 'firing . . . a good public servant' " (Resp. Br., p. 6) picks up four words from separate paragraphs of a memo in which Buchanan reported a *public perception* and ignores Mollenhoff's handwritten note on a copy of this memo that the characterization of Fitzgerald as "[a] good public servant might be questioned." JA 269a; DX 41; *see* Mollenhoff Dep. (R. 331-32) 132-33.

E: When Harlow was here. This case arose way early in the administration.

P: I thought it was a later —

E: No, no, no, no this is that guy that, uh, ratted on the C5A overruns.

P: Oh, yeah.

E: Way back.

P: But he's still in the Government.

E: And, no he's not and uh he's appealed to the Civil Service Commission to be restored.

P: I'm thinkin' of another case.

* * *

President: Uh — let me say that I, I've read this case, John. I'm thinking of another guy, actually, I — I —

Ehrlichman: You're thinking of that Navy fellow that talked about Ash. Yeah, the liti—

P: [unintelligible]

E: — this was four years back.

P: You see I had two names —

E: Yeah.

P: — in my mind.

Fitzgerald also errs in suggesting that Mr. Nixon directed his aides to prepare "the most godawful gobbledygook statement" in order to "permit Seamans to continue to invoke executive privilege and thus conceal White House involvement." Resp. Br., p. 10. The context of the conversation establishes that any such "statement" was to have been for purposes of Senate committee hearings on Watergate and in connection with Ehrlichman's discussions with "Ervin and all these people" with whom he had "been making the rounds." JA 217a. *See also* JA 184a (the press conference question to which a written answer was promised). John Ehrlichman so understood it and also viewed the use of "gobbledygook" as "a rather typical Nixonian piece of rhetoric, which meant to me that he did not want a short, concise, crystal clear document, but he wanted a document which was sufficiently

broad as to give him latitude." Ehrlichman Dep. (R. 444) 16, 18-19. Any doubt in this regard is laid to rest by the fact that Fitzgerald does not identify any "gobbledygook" statement issued by the White House permitting Seamans to continue to refuse to answer questions, and none exists.

At bottom, of course, this case does not depend on the resolution of such factual disputes, but on broader considerations. Nonetheless, these examples of respondent's ability to link together pieces of sentences and to rely on faulty recollections of obscure events underscore why forms of immunity that hinge in any respect on factual resolutions provide no dependable mechanism for "weeding out" frivolous suits.

ARGUMENT

I

Denial Of Absolute Immunity To The President Would Represent A Departure From History

Conceding the virtual absence of suits against Presidents until the very recent past, Fitzgerald proffers several explanations other than the immunity "historically accorded" the President. *See* Resp. Br., p. 21. His principal suggestion, "the difficulty of obtaining jurisdiction or proper venue against" the President, is incorrect, and the others he offers actually support Mr. Nixon's position.

Potential plaintiffs in the nineteenth century were not required by any rule to sue an "incumbent President only in the nation's capital and . . . a former President only where he resided." Resp. Br., p. 20. To the contrary, between 1789 and 1887, the most liberal general venue provision in our nation's history was in force; a plaintiff could sue in the district of the defendant's residence "or in which he shall be found at the time of serving the writ. . . ." Judiciary Act of 1789, § 11, 1 Stat. 73, 79. *See Camp* v. *Gress*, 250 U.S. 308, 311-12 (1919); 1 *Moore's Federal Practice*, ¶ 0.141[1], at 1337 n.2 (1981 ed.). Even after 1887, when venue was restricted, plaintiffs had no

more difficulty obtaining venue over a President in his personal capacity than other officials against whom suits were filed. [2]

The fact that plaintiffs were discouraged by the rule set out in *Spalding* v. *Vilas*, 161 U.S. 483 (1896), and that constitutional causes of action were slow to develop (Resp. Br., p. 21) supports, rather than undermines, Mr. Nixon's position. The "discouraging effect" of *Spalding* stemmed precisely from the fact that it confirmed, in Fitzgerald's words, that "federal executive officials enjoyed absolute immunity from damage suits under state statutory or common law for actions within the scope of their authority" (Resp. Br., p. 35), and these were the only causes of action then thought to be available. Respondent's explanations, then, hardly support the proposition that the immunity "historically accorded" the President was qualified. [3]

With regard to contemporaneous statements by the Framers and others concerning the subject of presidential immunity from suit, Fitzgerald's brief portrays such statements in a way wholly divorced from their intended context (*see* Resp. Br., pp. 15-16). Actually, the statements regarding the Framers' efforts to limit "privileges" were made when Americans were only a short period removed from being governed by royalty or its representatives, and as their context indicates, cannot be understood as commentary on the narrow category of legal rights Fitzgerald would now associate with that term. For example, James Wilson's comment on the "privilege[s]," "securit[ies]," and "distinction[s]" of the President (Resp. Br., p. 16) was a

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[2] Mr. Fitzgerald's brief exhibits confusion between suits against officials in their official and personal capacities. The idiosyncratic jurisdictional and venue problems to which Fitzgerald refers arose only in connection with the former category of suits. *See Stafford* v. *Briggs*, 444 U.S. 527 (1980). The dismissal of *Livingston* v. *Jefferson*, 15 F.Cas. 660 (C.C.D. Va. 1811) (No. 8,411), resulted from that suit's being classified as one of a class of "local actions" (because it involved real property), not a problem of venue applicable to suits generally.

[3] The statements by Presidents Jackson and Taft and Attorney General Butler which are quoted in Fitzgerald's brief to the effect that Presidents were liable with their subordinates (*see* Resp. Br., pp. 18, 19, 20 n.31) must also be viewed in the context of this understanding that executive officials were absolutely immune from actions within the scope of their authority.

rebuttal of the charge that the new government would be "the government of a few over the many — elected by themselves, or possessing a share in the government by inheritance, or in consequence of territorial rights, or some quality independent of the choice of the people." 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 523 (1836) (hereinafter "*Elliot's Debates*"). Similarly, Charles Pinckney's reference to limitations on "privilege" came in the context of a debate over whether Congress had the "privilege" (*i.e.*, power) of punishing a newspaper editor who had allegedly libelled legislators. 10 Annals of Cong., 6th Cong., 68-69 (1800).

Fitzgerald also omits the context of statements taken from a discussion in the North Carolina ratifying convention regarding the remedies available against "officers" (*see* Resp. Br., pp. 17-18). This discussion, prompted by concern that the difficulty of impeaching lower federal officials would leave citizens of the states without means to combat their abuses, was focused primarily on minor federal officers, such as "tax-gatherers." 4 *Elliot's Debates*, 36-37. Governor Johnson confirmed that charges against higher officials would be handled differently (*id.* at 37; emphasis added):

> *[M]en who were in very high offices could not be come at by the ordinary course of justice;* but when called before this high tribunal [the Senate] and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow-citizens, and then the courts of common law might proceed against them.[4]

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[4] Particularly in light of these remarks, it is not clear that Mr. Maclaine's statement the next day that Presidents would be "amenable" for "maladministration" referred to remedies other than impeachment and later prosecution or that his assurance that "citizens" who were distressed "would have redress in the ordinary courts of common law" even if "the President should give wrong instructions to his deputies" (Resp. Br., pp. 17-18) meant that the "redress" would be a suit for damages directly against the President. A short time later, a naval captain, acting in accordance with a directive from President Adams, detained a ship coming *from* a French port when Congress had authorized only seizures of ships sailing *to* French ports. The owner recovered damages from the captain, not the President, in this case of "wrong instructions to . . . deputies." *Little* v. *Barreme*, 6 U.S. (2 Cr.) 170 (1804).

Our opening brief quoted the views of early commentators such as John Adams, Oliver Ellsworth, and Justice Story, who emphasized the President's special immunity from suit. Nixon Br., pp. 25-26. Fitzgerald's attempt to limit the significance of these more authoritative explications of the Constitution to civil actions brought while the President remains in office is misplaced. *See* Resp. Br., pp. 18-19. For instance, when John Adams heard of the suit brought by Edward Livingston against Thomas Jefferson, which was filed after Jefferson had left office, he wrote Jefferson, "Great God! Is a President of the U.S. to be subject to a private action of every individual? This will soon introduce the axiom that a President can do no wrong, or another equally curious that a President can do no right."[5] Justice Story's summary of the law on Presidential accountability was likewise not subject to Fitzgerald's limitation. III J. Story, *Commentaries on the Constitution of the United States*, § 1563, at 419 (1833 ed.) (emphasis added):

> In the exercise of his political powers [the President] is to use his own discretion, and *is accountable only to his country and to his conscience*.

In closing, it is appropriate to place in perspective the dispute between the parties over what the absence of suits against the President during our two hundred year history establishes. Obviously, the legal and factual background against which this Court must resolve the issue of Presidential immunity is far different from that facing the Framers and early legal scholars. The presence of the federal government in the everyday lives and thoughts of Americans was then more limited, constitutionally-based causes of action did not exist in anything like their present form, and litigation occupied little, if any, role in disputes over government policy.[6] Subject to this cautionary note,

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[5] Letter from John Adams to Thomas Jefferson dated February 10, 1812, *quoted in* D. Malone, *Jefferson and His Time: The Sage of Monticello*, 62 (1981).

[6] Fitzgerald's effort to distinguish "political" actions for which the President can be impeached from "private" actions giving rise to civil remedies is elusive and without support. By quoting Wilson's comment that a President is "amenable [to suit] in his private character as a citizen, and in his public character by impeachment" (Resp. Br., pp. 15-16), Fitzgerald suggests that

the historical absence of suits against the President does indicate that the immunity available to executive officials was absolute, as exemplified by *Spalding* v. *Vilas*, *supra*. There is certainly *no* indication that the immunity "historically accorded" the President was qualified. Moreover, some commentators perceived special problems in suits against a President, as opposed to his subordinates. *See* Nixon Br., pp. 25-26. Finally, Presidents were simply not the subject of lawsuits until very recently, a phenomenon for which Fitzgerald offers no plausible explanation consistent with his position. Subjecting the President to liability in damages would thus be a significant departure from history, with no assurance that such a departure could avoid substantial costs to the effective functioning of the Presidency.

II

The Decisions Of This Court Do Not Limit Absolute Immunity To Judicial And Legislative Functions

Fitzgerald characterizes the "message" of the Court's cases as being that only legislative and judicial functions are entitled to absolute immunity. Resp. Br., pp. 23-24. This construction cuts the doctrine of absolute immunity off from its genuine policy roots and rests on the unsupportable assumption that the impact of civil damage liability on persons performing judicial and legislative functions is unique.

There is no factual support in Fitzgerald's brief for his assertion that the "decision-making processes" of judges and prosecutors "are particularly vulnerable to the hazards and distractions of collateral civil liability" (Resp. Br., p. 23). In truth, judges and prosecutors derive a measure of security from their performance within a well-developed procedural framework. By contrast, the choices facing a President are thrust upon him in a far less structured fashion and without the benefit of the adversary system. Unable to rely on the

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the Framers supported his view that Presidents can be sued personally. However, Wilson's statement actually makes it clear that a President, in his capacity as a citizen, always remains subject to suit for private wrongs, but for improper actions as President, whether denominated "political" or of a "public character," impeachment is the intended remedy.

regularity of the judicial process, Presidents actually have more to fear from "the hazards and distractions of collateral civil liability," and their "decision-making processes" are, in this sense at least, more vulnerable. For the same reason, litigation threatens the same "unduly inhibiting power over the deliberative processes" (Resp. Br., p. 23) of the President as the Congress.[7]

Nor can limiting absolute immunity to "judicial" and "prosecutorial" functions be justified on the basis of "procedural safeguards and the appellate process" which "ensure that deliberate constitutional violations will be minimized." *See* Resp. Br., p. 23. No such safeguards limit legislative action, and conduct by judges and prosecutors which would be actionable absent immunity invariably circumvents or vitiates the "procedural safeguards" of the judicial system. For example, in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), a judge was held immune in a case in which he had approved the sterilization of a minor without notice to the child involved and without even the creation of a court file. The very essence of the judge's alleged misconduct was that he took action in a manner which rendered all of the "procedural safeguards" of the judicial system meaningless. The

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[7] Fitzgerald seeks to further his argument that Presidents have no absolute immunity by pointing to the specific inclusion of the Speech or Debate Clause in Article I as a protection from civil suits for members of Congress. The inference he would have this Court draw runs contrary to prior rulings of this Court in which it held

> The difference between the grant of legislation power under Article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article II, is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended.

Myers v. *United States*, 272 U.S. 52, 128 (1926). In line with this construction, this Court, in *United States* v. *Nixon*, 418 U.S. 683 (1974), recognized a privilege of confidentiality rooted in the separation of powers shielding a President's discussions from unwarranted disclosure, even though no such "privilege" was explicit in Article II of the Constitution.

same is true of virtually all constitutional torts typically alleged against judges and prosecutors.[8]

The neat parallel that Fitzgerald would draw between the governor at issue in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and the President (Resp. Br., p. 24) does not withstand analysis. The President's duties and responsibilities are certainly on an entirely different plane in practice and, more importantly, in terms of their place in the Constitutional framework. The President is subject to a constitutional system of checks and balances not applicable to governors, and is more visible and thus accountable.[9]

In conclusion, the Court's decisions should not be understood as approving a mechanical form of analysis extending absolute immunity to "judicial" but not "executive" officials. The touchstone of absolute immunity is the public's interest in the "vigorous and fearless performance" of an official's duties, balanced against the minimal sacrifice of certain individuals' interest in civil damage actions. In this setting, the President's claim to immunity is of paramount significance.

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[8] In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), a defendant was sentenced to death on the basis of testimony that the prosecutor allegedly knew was perjured and exhausted the appellate process before the facts suggesting a possibility of prosecutorial misconduct were voluntarily disclosed by the prosecutor himself.

[9] Another basis exists for distinguishing *Scheuer* v. *Rhodes*, *supra*, from this case. In *Scheuer*, this Court had before it the issue of whether Congress intended to make governors absolutely immune from the express cause of action in damages it had created in Section 1983. 416 U.S. at 243, 248. Understandably, the Court was reluctant to conclude that Congress had expressly created damages liability on the one hand while revoking it *sub silentio* on the other. Even in the face of an expression of public policy by Congress that "any person" acting under color of law would be subject to suit, this Court felt compelled to afford a qualified immunity to the governor so as not to destroy his ability to function effectively. By contrast, this case neither turns on a specific expression that Congress intended the President to be liable in damages, nor a general statute holding government officials responsible for breaches of a citizen's private rights.

III

Public Policy Demonstrably Supports Absolute Immunity For The President

Fitzgerald's discussion of the policy considerations bearing on Presidential immunity begins with an attempt to limit artificially the scope of the inquiry. There is no merit to his suggestion that the fortuity of this suit's having been filed *after* Mr. Nixon left office "reduce[s]" Mr. Nixon to arguing anything less than the full range of issues raised by suits against Presidents generally, and this case surely does not depend on whether Mr. Nixon can present "evidence" regarding this suit's effect on the Ford, Carter, and Reagan Presidencies. *See* Resp. Br. 26.

The broader thrust of this argument, echoed throughout the brief, is that some principled basis exists for distinguishing between suits filed against incumbent and former Presidents, and that the compelling policies underlying absolute Presidential immunity are satisfactorily vindicated by postponement of active litigation until after a President has left office. However, the prospect of having to meet suits after leaving office will distract and influence the conduct of Presidents in office in the very same manner as suits pending while they are in office, and Presidents sued for damages to be satisfied from their personal estates cannot be expected to defer work on their defense. [10]

Another theme in Fitzgerald's brief is that Mr. Nixon's understanding of the effects of liability in damages is unsubstantiated — *i.e.*, unsupported by "a whit of evidence," "conjectural," and "exaggerated." Resp. Br. 26-29. To a large extent, of course, the same could be said of this Court's prior immunity decisions. Decisions to

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[10] Indeed, Fitzgerald contemplates that a President would view the period of a stay of a suit as "an opportunity to prepare a defense in the interim" (Resp. Br., p. 28) — an observation directly at odds with his suggestion that suits stayed while Presidents are in office will not divert them from their duties. The perception, noted by Fitzgerald, that defendants benefit from delay reflects the fact that defendants retain the use of the money at stake in a suit pending a final determination. A defendant's chances of ultimately prevailing do not improve with the passage of time and the burden of litigation does not diminish. *Compare* Resp. Br., p. 28.

grant judges, prosecutors, and legislators absolute immunity were not based on social scientific data, but rather on the Court's experience and understanding of the customary response to the threat of litigation. Lack of available evidence, largely a consequence of the absence of suits against Presidents, is surely no reason for this Court to sanction now an experiment regarding the effect of litigation on future Chief Executives.

A growing body of evidence, moreover, suggests that new causes of action and constricted immunity defenses have had a serious impact on lower executive officials. In recent Congressional testimony, the Deputy Attorney General reported that there were in excess of 2,000 *Bivens*-type lawsuits now pending against federal employees, some with multiple defendants, and that the number is growing rapidly as new theories of constitutional tort liability are recognized. Statement of Edward C. Schmults Before the Senate Committee on the Judiciary, Subcommittee on Agency Administration, concerning S. 1775, at 3-4 (Nov. 13, 1981). He and others have stated their experience as being that only the smallest percentage of these suits are meritorious, that their burden is nonetheless substantial, that many are filed to further inappropriate objectives, and that the overall effect on government is negative. *Id.* at 5-6, 9; Statement of Joseph A. Morris, General Counsel, U.S. Office of Personnel Management Before the House Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, on H.R. 24 [hereinafter H.R. 24 Hearings] (November 5, 1981); Statement by Honorable Peter J. Wallison, General Counsel of the Treasury Department, H.R. 24 Hearings (November 5, 1981); Griffin Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. Leg. 1 (1979). This evidence calls into serious question Fitzgerald's assertion, unsupported by "a whit of evidence," that the response to *Scheuer* and *Butz* has been a responsible one. *See* Resp. Br., p. 27.

Moreover, many of Fitzgerald's specific assurances regarding suits for damages are demonstrably inaccurate. Fitzgerald's suggestion that potential plaintiffs "are far more likely to seek equitable relief than damages" (Resp. Br., p. 27) implies that these forms of relief are mutually exclusive. They are not, and "politically moti-

vated litigants" will certainly join a claim for equitable relief with a blow aimed at a President's personal interests. *E.g.*, *Clark* v. *United States*, 481 F.Supp. 1086, 1090 (S.D.N.Y. 1979), *app. pndg.*, 624 F.2d 3 (2d Cir.); *Bohmer* v. *Nixon*, Civ. No. 75-4-T (S.D. Cal. 1976) (JA 303a); *Fonda* v. *Nixon*, Civ. No. 73-2442-MML (C.D. Cal. May 23, 1974) (JA 308a).

There is particular irony in Fitzgerald's suggestion that all a President need do to satisfy the qualified immunity defense is to seek the advice of counsel. *See* Resp. Br., pp. 27-28. In *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), Mr. Nixon did precisely that, relying on the advice of his Attorney General and the Director of the F.B.I. Likewise, the record in this case includes a transcript of Mr. Nixon's receiving legal advice from John Ehrlichman (JA 220a-21a), based on legal research done by White House counsel (JA 191a-93a). In both cases, reliance on such advice was of no value from the standpoint of qualified immunity. Plaintiffs merely alleged that the attorney was a "co-conspirator" and in effect that the legal advice was not *bona fide*. *See* R. 244.[11] Such allegations invariably defeat attempts to dismiss suits at the threshold.

More fundamentally, the spectre of Presidents charting this nation's course based on an attorney's advice as to what resolution of a controversial issue will be most defensible in the event of a subsequent civil action is precisely what absolute Presidential immunity is designed to avoid. The "vigorous and fearless performance" of Presidential duties undoubtedly will involve some actions that a lawyer

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[11] The problem is not limited to "Watergate" attorneys. In a recent decision, the D.C. Circuit reversed an order granting summary judgment in favor of Attorneys General Levi, Bell, and Civiletti in a damage action filed against twenty-eight officials, most of whom occupied Cabinet-level or near Cabinet-level positions. *Black Panther Party* v. *Smith*, No. 80-1302 (D.C. Cir. July 8, 1981). In an opinion which also belies Fitzgerald's assertion that qualified immunity is not "as empty a defense as Mr. Nixon suggests" (Resp. Br., p. 27), the court of appeals reinstated these defendants even though the district judge had ruled that the plaintiffs had had "ample opportunity" to take discovery and the court of appeals was "not convinced, on the basis of the record as it now stands, that [the plaintiffs] will be able to uncover any evidence implicating" these defendants. Slip op. at 10, 73.

would have to advise could pose a risk of civil exposure, if for no other reason than the possibility that a legal development might be characterized in retrospect as having been settled law, a new cause of action might be recognized, or counsel may be unable to reconstruct the context for an action on a motion for summary judgment or a trial. Absolute immunity is appropriate precisely in order to assure that this nation is governed ultimately by its elected President, subject to the safeguards embodied in the Constitution, and not by reference to a lawyer's advice addressed to the narrow concerns of future civil liability. [12]

Fitzgerald belittles Mr. Nixon's emphasis on the need for a defense that can be applied at the outset of litigation as a request for "a talisman that may be invoked to ward off all trials." Resp. Br., p. 29. This rhetoric only reflects Fitzgerald's low regard for the policies on which absolute immunity for prosecutors, judges and legislators rests. In those contexts, immunity's value in "warding off trials" is perceived as its strong point (*Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)):

> The justification for [recognizing absolute immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

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[12] Fitzgerald's attempt to downplay the efficacy of political checks on the President rings hollow in light of the facts of his own case. Mr. Fitzgerald has been the subject of widespread press attention for 12 years, and his termination led to Congressional hearings, Presidential consideration of a new position for him, and various Civil Service proceedings in which he has obtained relief. In fact, former President Carter made the Fitzgerald case an issue in his campaign in 1976. Fitzgerald's suggestion that a President will not be deterred by political checks short of impeachment or certain defeat in an upcoming election is plainly incorrect. Finally, while we concede that an individual "in Fitzgerald's shoes" (Resp. Br., p. 31) would prefer "$3,500,000 or more" in money damages to the reinstatement with backpay that he has recovered, the question whether relief other than money damages is "adequate" has never been considered so simplistic.

IV

Private Damage Actions Against A President Are Not Necessary To Protect Congress' And The Courts' Position In The Constitutional Plan

Fitzgerald does not seriously dispute that private damage actions against Presidents who could invoke no more than qualified immunity would entail routine judicial oversight of the motives behind Presidential decisions and inquiry into Presidential communications.[13] Rather, he incorrectly seeks to portray private lawsuits for damages as fundamental to Congress' ability to gather information and the courts' function of protecting rights. These arguments embody serious misunderstandings concerning the basis for absolute immunity and the distribution of powers among the Congress, the Judiciary and the Executive.

Absolute Presidential immunity from a private action for damages is not, contrary to Fitzgerald's position, "an unrestrained power of presidential removal" or a license enabling a President to "trample . . . rights at will." Resp. Br., p. 34. Such immunity does not represent any judicial approval of misconduct — *i.e.*, the granting of a "power" — or remove other checks on a President which prevent his acting "unrestrained" or "at will." Instead, immunity reflects the fact that plaintiffs initially appear in court with nothing more than allegations and that the judicial process of litigating those allegations is

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[13] His brief does criticize Mr. Nixon for "exaggerat[ing] the extent to which conversations with presidential advisers need be revealed," but this contention rests on a mistaken view of qualified immunity. *See* Resp. Br., p. 33 & n.42. In determining whether a President "knew" or "should have known" that an action was illegal, a court must not only examine "the state of the law" but also the facts that the President had before him in acting. *See* R. 447, pp. 4-8; R. 471, pp. 28-33 (disputing the extent of Mr. Nixon's knowledge based on his communications). Moreover, since plaintiffs are always reluctant to accept a defendant's testimony that his actions were in "good faith," a second element of the qualified immunity defense, they routinely seek discovery of communications justifying an inference to the contrary. Finally, Presidential communications will usually be relevant to the plaintiff's case-in-chief.

necessarily imperfect and costly. This reasoning is surely not the same as a decision that courts will cease to "fully perform their function of vindicating individual rights," and grants of absolute immunity to other officials have never been viewed as abrogating any judicial function. *See* Resp. Br. 34.

It unfairly devalues the powers conferred on Congress to suggest that "Congress cannot function effectively" (Resp. Br. 34) unless it can rely on suits by private citizens. In fact, Congress has performed its information-gathering function for 200 years without the benefit of private suits against Presidents, which are instigated by private litigants and thus are a most imprecise means of furthering Congress' role. Far more efficacious tools are available to Congress. It may subpoena witnesses and compel them to testify, a power it exercises with absolute immunity, sometimes not without substantial cost to witnesses. *See Tenney* v. *Brandhove*, 341 U.S. 367 (1951). It may legislate whatever protections it wishes for witnesses (including those proposed by Mr. Nixon which Congress chose not to pass, Resp. Br. 33 n.40), or, as some of its members elected to do in this case, lobby for criminal prosecutions, hold up legislative action requested by executive officials, and conduct hearings investigating and publicizing allegations of misconduct.

V

Fitzgerald's Claims Fall Within The Traditional Scope Of Absolute Presidential Immunity

Conceding the President's authority to prescribe the Secretary of the Air Force's conduct of the affairs of the Air Force, including personnel matters (*see* 10 U.S.C. § 8012(b)), Fitzgerald nonetheless asserts that actions taken by Mr. Nixon with regard to Fitzgerald were beyond the scope of any available immunity. He relies on his allegations that the reorganization through which Fitzgerald's job was abolished was a "sham" and that Mr. Nixon lacked lawful authority to terminate Fitzgerald "summarily" (Resp. Br., pp. 37-40). Neither allegation is material to the scope of Presidential immunity, since both concern only whether the actions attributed by Fitzgerald to Mr.

Nixon were "lawful" or "authorized," an issue distinct from whether they had "more or less connection with the *general matters committed by law to [Mr. Nixon's] control or supervision.*" *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896) (emphasis added).

A plaintiff does not raise a material dispute on the scope of an immunity merely by arguing that an action concededly within the "general matters" committed to a President's supervision — here, the personnel of the Department of Defense and the organization of their jobs — was a "sham." Any such rule would effectively vitiate both absolute and qualified immunity, since no plaintiff would hesitate to allege that official action was no more than a cover for a private wrong, and full litigation into the official's motives, essentially the merits of the suit, would be necessary to resolve the issue. This Court's decisions do not permit a plaintiff to circumvent a judge's absolute immunity by arguing that an order by a judge, not "in clear absence of jurisdiction," was a "sham" whose purpose was to inflict an unlawful injury. *Stump* v. *Sparkman*, 435 U.S. 349, 356-57 (1978). Fitzgerald's contention should be treated no differently. [14]

Similarly, the allegation that Mr. Nixon directed Seamans to discharge Fitzgerald "summarily" — *i.e.*, without the "cause" prescribed by 5 U.S.C. § 7512(a) — is relevant solely to the issue of whether the termination is lawful or "authorized," a much narrower issue than whether Defense Department employment was among the "general matters" within the President's cognizance. An action does not fall beyond the scope of any immunity whatever because it does not comply with all statutory qualifications placed on that action. Compliance with such statutory criteria, like the ones referred to by Fitzgerald, is relevant to whether an official has acted lawfully with

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[14] The CSC hearing examiner did not conclude that reorganization was "a sham," but rather that Fitzgerald was included in a *bona fide* reorganization for improper reasons — a finding that confirms that Fitzgerald's version of the scope of the immunity test would turn directly on the motives of officials responsible for official action. (*Compare* Resp. Br., pp. 39 n.45, 40). The district court's statement that "the President had no authority to hire, discharge, or interfere with the employment of an employee such as Fitzgerald" (JA 57a) is clearly incorrect in light of 10 U.S.C. § 8012(b) and the authority of the Secretary of the Air Force.

regard to "general matters" committed to his control or supervision, but not to whether he was acting beyond the scope of those matters altogether. Fitzgerald's analysis, which is merely an alternative means of verbally packaging the ultimate merits of the dispute, would, if generally applied, render immunities meaningless by making them unavailable except where an official's action was "authorized" and thus lawful.

In conclusion, it is appropriate to emphasize the basis for the absolute immunity summarized in *Spalding* v. *Vilas*, 161 U.S. 483, 494-95 (1896):

> The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions.

If the public's interest justifies absolute immunity for all judges, prosecutors and members of Congress and their aides, within the limits set by decisions of this Court, surely the same interest and the same reasoning apply to the President.

CONCLUSION

For the reasons stated above and in the Brief for Petitioner Richard Nixon, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss with prejudice the plaintiff's Second Amended Complaint against Petitioner Nixon.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE GOVERNMENT ACCOUNTABILITY PROJECT OF THE INSTITUTE FOR POLICY STUDIES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

The Government Accountability Project of the Institute for Policy Studies (the Project) respectfully moves the Court for leave to file the attached *amicus curiae* brief. The Project offers the following considerations in support of its motion:

1. The Government Accountability Project of the Institute for Policy Studies is a non-profit public interest group formed in 1975 to help restore and maintain confidence in the federal government by making public officials accountable for their activities. The Project receives no government funds. It is supported through the individual contributions of interested citizens and grants from private foundations.

2. In pursuit of its goal of accountable government the Project works to broaden public understanding of the role of the federal employee in preventing government waste, fraud and abuse.

3. The Project has been especially concerned about civil servants whose careers are destroyed for having spoken out against government wrongdoing or waste. Through public education, selective legal action, public comments to government agencies and, upon request, testimony before Congress, the Project works to protect the First Amendment rights of all

federal employees to initiate constructive criticism without fear of retaliation, and to provide these men and women of conscience with vital support.

4. The Project has published *A Whistleblower's Guide to the Federal Bureaucracy* in an attempt to assist those who are considering blowing the whistle about problems within their government workplace. From time to time Project personnel write articles and speak publicly about the need to protect whistleblowers.

5. The Government Accountability Project of the Institute for Policy Studies along with the Fund for Constitutional Government offered an *amicus curiae* brief to the Court in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). The Project also presented an *amicus curiae* brief in each of two cases before the United States Court of Appeals for the District of Columbia Circuit entitled *Frazier v. Merit Systems Protection Board*.

6. Not only has the Project testified before committees of the United States Congress on issues related to First Amendment rights and whistleblower protections, but it has also presented testimony in both houses of Congress on the issue of liability for high government officials who engage in constitutional violations against American citizens. The Project

has again received an invitation to testify about this issue before the Senate Judiciary Committee.

7. The *amicus curiae* brief is unique because it takes the position that given a willful violation of an individual's First Amendment rights only qualified immunity for the alleged violator will protect the interest of the individual, as well as the effective operation of the government. The Project has given serious consideration to the effect that the grant of absolute immunity for high government officials will have upon government employees as well as the nation. The ramifications of granting absolute immunity to executive officials who have allegedly violated the First Amendment would be, in the Project's opinion, far-reaching and disastrous. Executive officials could then do through their actions what they cannot command by law.

8. *Amicus'* efforts on behalf of federal employees are made in implementation of a belief that a professional, dedicated civil service is essential to an effective democracy. Civil servants are a vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions.

It is with these thoughts and these interests in mind that the Government Accountability Project respectfully moves the Court to accept its *amicus curiae* brief.

Respectfully submitted,

Louis Alan Clark

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Motion for Leave to File *Amicus Curiae* Brief on Behalf of the Government Accountability Project of the Institute for Policy Studies and the attached *Amicus Curiae* brief have been mailed this date, by regular mail, to:

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INTEREST OF AMICUS

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public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing government waste and corruption.

GAP has been especially concerned about civil servants whose careers are destroyed for having spoken out against government wrongdoing. Through public education, legislative efforts and selective legal action, GAP works to protect the First Amendment right of all federal employees to initiate constructive criticism without fear of retaliation, and to provide these men and women with vital support. *See, e.g.*, GAP's publication, *A Whistleblower's Guide to the Federal Bureaucracy* (1977). *Also see* Brief for Amici Curiae The Fund for Constitutional Government and the Government Accountability Project of the Institute for Policy Studies, *Givhan v. Western Line Consolidated School District*,

439 U.S. 410 (1979). GAP has particularly concentrated on implementation of the "whistleblower" protections of the Civil Service Reform Act of 1978, §§ 101, 201, 5 U.S.C. § 1101 (Supp. III 1979). *See Civil Service Reform Oversight, 1980--Whistleblower: Hearings before the Subcommittee on Civil Service of the House Post Office Committee*, 96th Cong., 2d Sess. 45-71 (1980); Briefs for Amicus Curiae The Government Accountability Project of the Institute for Policy Studies, *Frazier v. Merit Systems Protection Board*, No. 80-1067 (D.C.Cir., filed May 20, 1980); *Frazier v. Merit Systems Protection Board*, No. 80-1986 (D.C.Cir., filed January 6, 1981).

Amicus' efforts on behalf of federal "whistleblowers" are made in implementation of a belief that a professional and dedicated civil service is essential to an effective democracy. Civil servants are a

vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions. Amicus believes that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of the federal bureaucracy to the general public, conscientious individuals who wish in good faith to point out illegal or questionable practices must not be forced to choose between their jobs or silence.

STATEMENT OF THE CASE

A. Ernest Fitzgerald - respondent in this case - is Deputy for Productivity Management, U.S. Department of the Air Force. In 1968 as Deputy Assistant Secretary for Management Systems, Office of the Assistant Secretary of the Air Force for Financial Management, he was a key Pentagon cost control expert. His unblemished

record of government service included consistently "Outstanding" performance evaluations, numerous honors and nominations for the Citation of Honor and the Distinguished Civilian Service Award. On November 13, 1968, in response to an invitation and with the express approval of the Department of Defense, respondent testified before a subcommittee of the Joint Economic Committee of the Congress. When asked if there would be a $2 billion cost overrun on a significant military acquisition, the C-5A cargo airplane, respondent truthfully reported that the figure was approximately correct. *Economics of Military Procurement: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee,* 90th Cong., 2d Sess., 199-200 (1968-69).

His testimony neither directly criticized any Department of Defense employees, nor discussed confidential or classified

information. Publicly his superiors did not challenge the accuracy or propriety of his testimony. Nevertheless, his career plummeted. His responsibilities immediately shrank from oversight of major weapons systems to assignments such as investigating allegations of cost overruns at bowling alleys in Thailand. His staff was removed and his status as a career employee in the civil service system was revoked. *See generally The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee,* 91st Cong., 1st Sess. (1969).

On January 6, 1969, two months after the testimony, John Lang, Administrative Secretary of the Air Force, prepared a memorandum outlining three ways which could result in respondent's departure. Respondent became aware of the memorandum two days later. His superior showed it to

him to let him know that he was no longer useful to the Air Force, as a result of his testimony and the ensuing publicity. Among others Lang listed reduction-in-force (RIF), the method which was used eventually. In May 7, 1969 testimony before the House Armed Services Committee, the Secretary of Defense accused respondent of leaking confidential documents, a charge which proved groundless. Also in May 1979, respondent was investigated on conflict-of-interest allegations, which also proved groundless and were dropped. *Fitzgerald v. Seamans*, 553 F.2d 220, 223-24 (D.C.Cir. 1977).

On November 4, 1969 respondent's position was abolished in a RIF, effective January 5, 1970. Secretary Seamans explained to Congressmen and Senators in November that respondent was laid off because he was not a "team player." Secretary of Defense Melvin Laird testified before the House Appropriations Committee

that respondent had been "fired" although his C-5A estimates were accurate. *Fitzgerald v. Seamans, supra,* at 224. On January 2, 1970 respondent appealed his termination to the Civil Service Commission and on September 18, 1973 was ordered reinstated to an equivalent position with back pay, based on a finding that " the agency's decision to abolish Mr. Fitzgerald's position and to include him in the Project 703 reduction-in-force improperly resulted from and was influenced by reasons purely personal to the appellant; and was for the purpose of terminating his employment with the Air Force." *Id.* at 222-23, citing Decision of CSC Chief Appeals Examiner, September 18, 1973, at 19-20.

In January 1974 respondent initiated the present suit for damages. The district court has stated that the complaint states valid claims under the First Amendment, 5 U.S.C. § 7211 (employees' right to

petition Congress) and 18 U.S.C. § 1505 (felony for obstructing congressional witness). Petitioners Nixon, Butterfield and Harlow moved for summary judgment on the grounds of absolute immunity. On March 26, 1980, the district court denied the availability of absolute immunity, citing *Butz v. Economou*, 438 U.S. 478 (1978), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Nixon Petition for Certiorari, Appendix A, 1a-5a. On April 30, 1980 the court of appeals granted respondent's motion to dismiss petitioners' appeal. *Id.* Appendix D, 35a-36a.

SUMMARY OF ARGUMENT

Petitioners' call for absolute immunity for any act of the President and top assistants cannot coexist with the principles and holding of *Butz v. Economou*, which culminated a long trend of decisions

holding all government officials liable for deliberate constitutional violations, with certain carefully limited exceptions. All of the exceptions limit absolute immunity to actions taken within the forum where the officials legitimately have direct authority and where abuses are limited by or are even a function of checks and balances built into the forum. Absolute immunity for adjudicatory decisions is limited to actions by officials whose positions are structurally isolated from political pressure. Petitioners, on the other hand, represent the zenith of political pressures. While their responsibilities are immense, they do not justify a claim to unlimited authority. Even a President cannot claim that it is a prerogative of office to fiat away the protections of the civil service system and to trample with impunity upon the First Amendment.

In *Scheuer v. Rhodes*, the Court reasoned

that all government employees, from clerk to governor, state or federal, can function effectively without being granted a blank check to violate the Constitution. Indeed, *Butz* cautioned that the broader the scope of general authority, the greater the potential for massive abuse. Rather than fears of government paralysis if a President who abuses the First Amendment is held liable, the relevant concern is the functional paralysis of nearly three million federal civil service employees if absolute immunity were granted.

Pickering v. Board of Education recognized that First Amendment violations interrupt the free flow of information needed to develop federal policies. It long has been recognized that the open exchange of ideas is a foundation of the checks and balances "essential for the conduct of public business." The Civil Service Reform Act of 1978 established a national policy that

legitimate government whistleblowers should not be subject to retaliation due to lawful disclosures. While the preconditions for constitutionally protected speech represent a difficult burden to establish, the value of the speech is undeniable for the public interest. The catalyst for the retaliation alleged in this case, disclosure at a congressional hearing of a $2 billion cost overrun, illustrates the fundamental stakes involved in First Amendment violations -- threats to the separation of powers by suppressing the free flow of information that Congress must have to fulfill its constitutionally-mandated oversight role; and compromises to the national security through the suppression of disclosures of gross waste in major military acquisitions.

Butz requires that damages be an appropriate remedy for the constitutional violation before liability will be imposed. Freedom of expression is appropriate as

one of the personal liberties *Butz* seeks explicitly to protect. Indeed, damages are essential to provide a comprehensive remedy for a victim of unconstitutional First Amendment retaliation. Respondent's experience illustrates that reinstatement and back pay are pyrrhic victories for a truth-teller who incurs the wrath of a President. Respondent is still struggling to enforce a decision initially made eight years ago that theoretically returned him to his 1968 responsibilities. He has been emotionally battered, unjustly accused of serious misconduct, investigated and forced to incur crippling debts while obtaining three reinstatement decisions that have represented little more than paper victories. The only way to avoid this fate would have been to abandon his duty to the public and to lie to Congress. Merely to honestly do his job, respondent had to make an untenable choice between sacrificing the public interest or

sacrificing his professional future. Only damages can adequately compensate an individual whose constitutional rights are violated because he insists on upholding his public trust.

Further, *Butz* explicitly considers the importance of deterring future constitutional violations as a criterion for the award of damages. In the case of First Amendment violations, the public interest demands individual liability for damages to achieve this goal, particularly when the transgressor is the President or a top assistant. Freedom of expression is the bedrock of accountable government, and the public interest requires liability for damages as a deterrent to First Amendment violations. Passage of the Civil Service Reform Act heightens the need for damages to deter presidential abuses, since it tacitly exempts the President from disciplinary sanctions. Further, the Reform Act

cedes decisionmaking authority to the President for sanctions against assistants who may have been carrying out his wishes by retaliating against whistleblowers. In short presidential violations of a government employee's First Amendment rights represent a classic case where the employee's ability to sue for damages may be the *only* individual means of pursuing the *Butz* goal of deterrence.

ARGUMENT

I. ABSOLUTE PRESIDENTIAL IMMUNITY FOR ANY ACT, INCLUDING FIRST AMENDMENT VIOLATIONS THAT CIRCUMVENT THE CIVIL SERVICE SYSTEM AND STIFLE THE FLOW OF INFORMATION TO CONGRESS, WOULD ABDICATE THE PREMISES OF GOVERNMENT ACCOUNTABILITY IN *BUTZ v. ECONOMOU*.

Petitioner Nixon seriously misconstrues the Court's holding in *Butz v. Economou*, 438 U.S. 478 (1978). In *Butz* the Court stated:

> We...hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*.... *Id.* at 507.

Petitioners argue that absolute immunity for the President and senior presidential advisors is necessary under *Butz* as "essential for the conduct of the public business." (Pet. Nixon's Brief, at 33; Pet. Harlow's Brief, at 41.) But petitioners' assertion can only be accepted by discarding the principles behind the limited exceptions of *Butz*. With respect to the First Amendment violations alleged in this case, it is clear that petitioners would sacrifice the public interest in order to escape even the possibility of responsibility for their abuses of power. Petitioners seek to overturn *Butz*, not to apply it.

A. Grants of absolute immunity are limited to official misconduct within carefully-structured adjudicatory forums insulated from political pressures.

While qualified immunity from damages is the general rule for executive officials charged with constitutional violations, the Court has found that some officials' special functions required a full exemption from liability. *Butz v. Economou, supra,* 438 U.S. at 508. In each case, the officials have exercised judicial or prosecutorial functions. *Butz v. Economou,* 438 U.S. 478 (1978) (agency official acting in quasi-judicial role); *Imbler v. Pachtman,* 424 U.S. 409 (1976) (state prosecutor); *Pierson v. Ray,* 386 U.S. 547 (1967) (state judges); *Bradley v. Fisher,* 80 U.S.(13 Wall.) 335 (1872) (federal judge).

In each case the Court considered the need for unrestricted freedom within a carefully delineated forum and the need for structural barriers against constitutional

violations inherent in the forum -- safeguards to limit the likelihood of and injury from malicious constitutional violations. For example, the courts require total independence from outside pressures, operate within a setting comparatively free of political influence, follow a careful system of legal precedent and correct errors through a well-developed system of appeal. Similarly, within the litigation process prosecutors must be free to argue their cases within unrestrained enthusiasm. Their damage is neutralized within the court by opposing counsel that has an equally free rein. Indeed, abuses by overzealous prosecutors in part are a function of an adversary system that requires vigorous debate to function effectively. *Butz, supra,* 438 U.S. at 508-13.

Petitioners offer no equivalent support for their assertion of immunity. Their position that a President has authority to

order the dismissal of a civil service employee barely merits serious discussion. No federal official has the power to defy the statutes and regulations protecting the rights of federal employees, *Vitarelli v. Seaton*, 359 U.S. 535 (1959), not even the President. *Cf. National Treasury Employees Union v. Reagan*, No. 81-1294 (D.C.Cir. August 11, 1981). Petitioners' characterizations of the alleged misconduct as a routine triviality -- "one of countless such matters" and a "daily" occurrence similar to the grievances of "hundreds of other individuals or groups" (Pet. Harlow's Brief at 66) -- illustrates the core of petitioners' claim. If the President and a small band of senior advisors can fiat away the civil service system adjudicatory process on a routine basis, there are no limits to the scope of their authority.

This is not an instance where an official seeks to operate freely within a limited

adjudicatory structure. Rather, petitioners seek to freely replace the civil service laws with their own preferences, including the discretion to suspend the First Amendment without incurring liability. Of course, the adjudicatory structure does not anticipate arbitrary presidential manipulation. As a result, there are no safeguards built into the process to neutralize presidential abuses of power.

Finally, unlike a jurist insulated from politics, the President and his senior advisors represent the zenith of the political process. Far from being bound by precedent the President routinely must display the flexibility to respond to political pressures, at the expense of consistency. The office maximizes the potential for manipulation of constitutional rights. In short, the nature of the presidency represents the opposite of the governmental structures to which the Court has granted

absolute immunity.

B. The presidential team can function effectively within constitutional limits.

The Court already has considered and rejected the concept that a chief executive's wide range of responsibilities requires freedom from constitutional liability. In *Butz* the Court stated that "*Scheuer* and other cases have recognized that...insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz v. Economou, supra,* 438 U.S. at 506-07. The Court noted that *Scheuer* held that the same factors petitioners emphasize -- the broad scope of responsibility and the necessity of acting decisively even during the confusion of a civil disturbance -- do not justify absolute immunity against constitutional suits for the chief executive on the state level. *Id.* at 497. The Court

emphasized the same liability for the constitutional transgressions of federal officials and state officials. "Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers." *Id.* at 501. *See also Forsyth v. Kleindeinst*, 599 F.2d 1203, 1210-11 (3rd Cir. 1979).

Petitioners' complaints that liability will lead to functional paralysis have a stale, hollow ring. Petitioners offer no empirical support for this time-worn rationalization. If petitioners' theories are correct, state governors have been paralyzed since *Scheuer* and federal employees since the *Butz* decision, since the courts are "habitually requiring" full trials on "mere allegations of [constitutional' malice." Pet. Harlow's Brief, at 63, 65. The record is conspicuously barren of evidence to support petitioners' cry of

wolf.

Moreover, even if correct in the abstract, the excuse would not apply to respondent's claim. Petitioners do not contend that the decision to fire respondent Fitzgerald was a case of crisis decisionmaking or a choice requiring split-second judgment and national leadership. Instead, they characterize it as part of the daily routine. Surely the presidential team does not require immunity to respond effectively to *any* issue, even one that it perceives as a trivial personnel dispute.[1/] Far from justifying absolute

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[1/] We are confounded by petitioners' reliance on *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949). Even prior to *Butz* that decision was severely modified if not tacitly overruled within the Second Circuit by *Bivens v. Six Unknown Narcotics Agents*, 456 F.2d 1339, 1342 (2d Cir. 1972). *See* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U.COLO.L.REV. 1, 50-51 (1972). In *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), the Court did not reach the question of immunity. However, on remand the Second Circuit considered the issue at length. The policy behind the immunity doctrine, the court stated, "is to protect an official who 'may later find himself hard put to it to satisfy a jury of his good faith'." *Bivens, supra*, 456 F.2d at 1344. In order

immunity, the limitless scope of authority claimed by petitioners flies in the face of the Court's reasoning: "Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct.

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to apply this policy, the court fashioned a two-step test. First, a determination must be made as to whether the officials "acted manifestly or palpably beyond their authority." *Bivens, supra,* at 1345. The second step goes well beyond the inquiry made in *Gregoire,* which is limited to a determination of the officials' scope of authority. *Gregoire, supra,* 177 F.2d at 581. If an official establishes that he was acting within the scope of his authority he must further show that the acts complained of were within "the sound exercise of discretionary authority." *Bivens, supra,* 456 F.2d at 1345 (quoting *Barr v. Matteo,* 360 U.S. 564, 575 (1959)).

While the doomsday predictions of *Gregoire v. Biddle, supra,* are persuasive, long before *Butz* they had ceased to represent the law even in the Second Circuit. *Gregoire* must be read in light of the Second Circuit's decision in *Bivens, supra.* Careful attention must be given to the specific acts complained of and the need of the public official to perform those acts. A simple determination that the act was within the perimeter of the official's authority is no longer sufficient. Consequently, petitioners' reliance on *Gregoire v. Biddle,* which mandates a "necessity" prerequisite for the application of immunity, is erroneous. In the absence of empirical support, petitioners cannot evade constitutional liability on the basis of overruled rhetoric.

Extensive Government operations offer opportunities for unconstitutional action on a massive scale." *Butz v. Economou, supra,* 438 U.S. at 506.

C. Qualified immunity is absolutely necessary to protect the public's First Amendment interest in the contributions of government employees to full and informed debate on public policy.

The public's interest in the value of First Amendment contributions by government employees far outweighs any advantages obtained by offering the President a blank check to violate personal liberties without judicial accountability. Implicit in *Pickering v. Board of Education,* 391 U.S. 563 (1968), is the Court's recognition that permitting retaliation for the exercise of dissent would deter government employees from speaking out. Recognizing the value of dissent under the First Amendment both

for the individual and for society, *Pickering* established a balancing test to determine constitutionally-protected speech. The test compares the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees. *Pickering, supra,* 391 U.S. at 568.

The balancing test is uniquely suited to weigh petitioners' concerns about avoiding disruption through personal liability with the public value of an individual's constitutional rights. While the precise application of the *Pickering* balancing criteria varies with each case,[2/]

[2/] The test is flexible and can be tailored to the requirements of individual jobs. As one commentator has noted, "[E]mployees can be arrayed on a spectrum, from university professors at one end to policemen at the other." *Free Speech and Impermissible Motive in the Dismissal of Public Employees,* 89 YALE L. J. 376, 381 n. 43 (1979).

> Some of the factors that appear to have entered into the "balancing" in such cases include the sensitivity and confidential nature of the employee's position and the government's consequently legitimate need for secrecy; the nature of the subject on which the employee speaks out; any interference with the performance of his job resulting from the speech; the context of the speech and accompanying conduct; its anticipated effect on agency morale and upon working relationships with immediate superiors.

Hanson v. Hoffman, 628 F.2d 42, 50 (D.C. Cir. 1980). More than with any other constitutional right, these factors facilitate direct comparison on a case-by-case basis of the public interest in absolute immunity with the public benefits that underlie the First Amendment.[3/]

[3/] At least for constitutional suits under the First Amendment, the *Pickering* tests eliminate any credibility for petitioners' point that frivolous suits go to trial. A far better test is merely to determine whether plaintiff engaged in protected speech. It is no mean feat to prove that speech is constitutionally protected under the First Amendment. Indeed, if plaintiffs had to prove retaliatory malice by clear and convincing evidence

There is no question that speech protected by the First Amendment contributes heavily to healthy decisionmaking within government agencies.

> Government employees may thus make important contributions to the discussion of public issues, and those contributions may become the more vital as the viewpoint of the speaker diverges from official policy. Furthermore, freedom of expression on the part of government employees can play an important role in counteracting those stultifying forces which customarily pervade bureaucracy. Organizational pressures toward dullness and conformity in the public service can perhaps be partly overcome by establishing firm principles that encourage, or at least protect, diversity in opinion and discussion.

T. Emerson, *The System of Freedom of Expression*, 563-64 (1970).

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before trial as petitioners suggest, Pet. Harlow's Brief at 67-8, their burden of proof would be higher to survive a motion for summary judgment than to reverse the burden of proof to defendants at trial. Petitioners' suggestion would carve a loophole in the Federal Rules of Civil Procedure for presidential liability. But more significant, it would completely reverse the burdens of proof developed over the last decade to test First Amendment claims.

Equally significant, government experts who are free to testify truthfully at public hearings are essential tools of government accountability.

> Expression of this sort, taking place in the public arena, falls more clearly within the main currents of the system of freedom of expression. It involves an effort to alert the public to problems buried in the depths of the bureaucracy, or at least to participate in open discussion of public affairs. It thus serves one of the basic purposes of the First Amendment in aiding the citizenry to check upon the operations of government. This function is enhanced when the particular employee has a special knowledge of the facts, a particularly relevant experience, or other forms of expertise.

Id. at 574.

Congress included 5 U.S.C. § 2302(b)(8)[4/]

[4/] 5 U.S.C. § 2302(b)(8) provides protection against reprisal for "a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--(i) a violation of any law, rule or regulation, or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not

in the Civil Service Reform Act of 1978, *supra*, in explicit recognition of the need "to protect whistleblowers from improper reprisals." *Report of the Senate Committee on Governmental Affairs on S.2640*, Rep.No. 95-969, 95th Cong., 2nd Sess. 8 (1978). In fact, the legislative history of the Reform Act refers to respondent Fitzgerald's experience to illustrate the necessity of a statutory shield:

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to *assure them* that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon

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specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs...."

> employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation. (Emphasis added.)

Id. The experience of the Civil Service Reform Act has been a bitter disappointment for whistleblowers. Despite the legislative mandate, the quasi-judicial Merit Systems Protection Board has failed to find a single example of illegal retaliation against whistleblowers. The congressional evaluation was clear, however. The public interest requires freedom for government employees to engage in legitimate, constructive dissent.

Respondent's experience illustrates several significant values of protected speech. His cause of action for violating 5 U.S.C. § 7211 is merely one example of the interests served by the First Amend-

ment, but it is of fundamental importance to the separation of powers and to proper congressional oversight. The statute declares:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or member thereof may not be interfered with or denied.

It was passed in 1912 to reverse President Taft's "gag rule" forbidding civil servants from communicating information to Congress without the consent of department chiefs. The law was passed to codify First Amendment rights and to reestablish the free flow of information to Congress. As one supporter declared:

> How can a conscientious Member of Congress vote intelligently and for the best interests of the American people if the most reliable sources of information are closed to him? I am glad that this rule is to be abrogated, not only because of my sympathy for these men, who have been unreasonably

> restrained in their rights as citizens, but I am glad because hereafter I shall be free to seek and secure information that will enable me the better to discharge my duties as a Representative.

Appendix to 48 CONG. REC. 140 (1912) (remarks of Representative Stone). The bill's sponsor characterized the "gag rule" as "un-American, unjust. It may fit into the scheme of things in a country like Russia, but it is entirely antagonistic to the spirit of our institutions. It is a slap at the Constitution and an affront to our citizens."[5/] 48 CONG. REC. 10671

[5/] Representative Lloyd explained:

> If no Government employee is permitted to speak, excepting through his department chiefs, and the department chief through the Cabinet officer, then this is an aristocratic Government, dominated completely by the official family of the President. If the principle enunciated in these Executive orders is to be carried to the extreme, then there is no possible way of obtaining information excepting through the Cabinet officers, and if these officials desire to withhold information and suppress the truth

(1912) (remarks of Representative Lloyd). In short, presidential retaliation against government employees for protected speech not only slaps the constitutional liberties of individual public employees and deteriorates the quality of public policy decisions, it also threatens our constitutional system of checks and balances by impeding the free flow of information necessary for effective congressional oversight. Certainly in contexts such as respondent's 1968 Senate testimony, the public interest in promoting free speech overwhelms the public interest in removing the presidential team from uncertainties about their liability for snuffing it out.

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or to conceal their official acts it is within their power to do so. This Government will be more popular when its official proceedings are an open book and the conduct of its officials continuously subject to scrutiny and investigation by the people at any time and in any manner the people elect. 48 CONG. REC. 10671 (1912) (Remarks of Representative Lloyd).

The content of respondent's speech served an essential function by combatting gross waste of the taxpayers' funds, an approximately $2 billion cost overrun, on a key weapons purchase. The sky may have been the limit on the C5-A overrun if respondent Fitzgerald had not blown the whistle. Of even greater significance, his disclosure facilitated the exposure of a dangerous military "lemon" that could have directly threatened the national security. Certainly petitioner Nixon should not challenge the essential nature of respondent's speech. Thirty years ago respondent Nixon declared:

> Mr. President, I have introduced in the Senate today a bill to make it a violation of law for any officer of the Federal Government to dismiss or otherwise discipline a Government employee for testifying before a committee of Congress.
>
> ...It is essential to the security of the Nation and the very lives of the people, as we look into these vitally important issues, that every witness

> have complete freedom from reprisal when he is given an opportunity to tell what he knows.
>
> There is too much at stake to permit foreign policy and military strategy to be established on the basis of half truths and the suppression of testimony.
>
> Unless protection is given to witnesses who are members of the armed services or employees of the Government, the scheduled hearings will amount to no more than a parade of yes men for administration policies as they exist.

97 CONG. REC. 4393 (1951) (remarks of Senator Nixon).

On balance, the courts have directly weighed the interest of preventing disruption against the value of First Amendment rights. The court in *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979), addressed this point with great clarity. In a case where a clerk-typist exposed corruption in the office the court found that:

> [I]t would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordi-

> nates who blow the whistle simply because the speech somewhat disrupted the office.

Id. at 773-74. This is particularly true in respondent's case. His speech served *both* the *Pickering* factors, increased government efficiency and freedom of expression, interests normally at odds.

Respondent's experience demonstrates the public interests sacrificed when a President presumes to be the owner of government information, rather than the catalyst.

Certainly this case presents a clear test of the protection the Court offers for the First Amendment. If the President or his senior advisors are absolutely immune from damages for firing respondent Fitzgerald, then the presidential team has the authority to totally "gag" nearly three million employees, regardless of the public importance of the issues, without fear of judicial liability.

II. *BUTZ v. ECONOMOU* MANDATES THAT DAMAGES ARE ESSENTIAL TO PROVIDE COMPREHENSIVE RELIEF, TO DETER FUTURE CONSTITUTIONAL ABUSES AND TO REDUCE THE CHILLING EFFECT OF UNCERTAIN FIRST AMENDMENT COVERAGE.

A. Damages are an appropriate remedy for First Amendment violations.

The Court has cautioned that "[a]bsent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages...." *Butz v. Economou, supra,* 438 U.S. at 503. This caution is well taken but not applicable to respondent's case.

The explicit concern of the *Butz* Court was to protect citizens from federal executive officials whose "broad authority... enables them to direct subordinates to undertake a wide range of projects -- including some which may infringe such

important personal interests as liberty, property, and *free speech*." *Butz v. Economou, supra*, at 505 (emphasis added). In view of the Court's language in *Butz*, there should be little doubt that damages are the appropriate remedy for First Amendment violations.

Indirectly, the Court already has endorsed damages for First Amendment violations in the context of § 1983 suits. In *Carey v. Piphus*, 435 U.S. 247 (1978), a suit brought under 42 U.S.C. § 1983 by public school students for violation of due process rights, the Court stated that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Id.* at 254.[6/] The Court observed that

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[6/] Since freedom of expression serves both the individual's interest and the public interest in

lower federal courts generally agree that "awards under §1983 should be determined by the compensation principle." *Id.* at 255.

It cannot seriously be maintained that constitutional rights compensable under 42 U.S.C. § 1983 are transformed when a suit is brought directly under the Constitution against federal officials. The words of the Court in *Butz, supra,* support this contention. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does federal officials is to stand the constitutional design on its head." *Butz v. Economou, supra,* 438 U.S. at 504. Accordingly, First Amendment rights which are compensable under § 1983 should be no

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government accountability, the analysis in the previous section of public benefits applies equally to damages.

less compensable in a direct suit under the Constitution.

Carey v. Piphus, supra, 435 U.S. at 255 n. 8, cites two cases that establish First Amendment violations within the scope of § 1983: *Stolberg v. Members of Bd. of Trustees for the State Colleges of the State of Connecticut,* 474 F.2d 485 (2d Cir. 1973), and *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970). In both cases the plaintiffs brought suit under 42 U.S.C. § 1983 for violations of their First Amendment rights. In *Stolberg, supra,* plaintiff, a professor, was denied renewal of his contract and consequently denied tenure. The trial court found this to be a retaliatory employment practice in violation of plaintiff's First Amendment rights. The court ordered reinstatement and back pay. On appeal the Second Circuit considered the trial court's denial of compensatory

damages.[7] There the court found that, "compensatory damages...were denied for failure of proof...." *Stolberg, supra,* 474 F.2d at 488. However, the court clearly stated that,"[A] district court may award damages for emotional distress ... found to have resulted from loss of a public job... from which [plaintiff] has been *unconstitutionally dismissed...."* *Stolberg, supra,* at 489 (emphasis added).

Donovan v. Reinbold, supra, offers a similar analysis. Again plaintiff was fired from his job for exercise of First Amendment rights. The Ninth Circuit considered the award of compensatory damages and found that they were proper. The court noted that "[d]amages can...be awarded for emotional and mental distress caused by an intentional tort" and found that the

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[7] The Second Circuit awarded attorneys fees in order that "plaintiff and others...are not deterred from securing such vindication [of constitutional rights] by the prospect of costly, protracted proceedings.... *Stolberg, supra,* at 490.

evidence "including the evidence of [plaintiff's] emotional distress resulting from his loss of employment" was sufficient to sustain the district court's finding of compensatory damages. *Donovan, supra,* at 743.

It is not surprising that *Carey* cited precedents of damages for First Amendment violations under §1983. Historically, the Court has recognized the close interrelationship between First and Fourth Amendments as expressions of personal liberty. *Cf. Stanford v. State of Texas,* 379 U.S. 476, 484-85 (1965); *Marcus v. Search Warrant* , 367 U.S. 717, 731-32 (1961). And as *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388, 395 (1971) explained, "Historically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." It is persuasive that the ourts have recognized this premise by permitting causes of

action under *Bivens* for First Amendment suits. *See, e.g. Patton v. LaPrade*, 524 F.2d 862, 869 (3d Cir. 1975); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 160 (D.D.C. 1976); *Butler v. United States*, 365 F. Supp. 1035, 1039 (D. Haw. 1973).

B. Only damages provide comprehensive, effective relief.

Petitioners claim that statutory remedies represent an effective substitute that defeats a *Bivens* cause of action.*/ (Pet. Harlow's Brief at 34.) Initially, respondents fundamentally misread *Carlson v. Green*, 446 U.S. 14 (1980), by relying on *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981). *Bush* also inferred that an alternative statutory remedy is a special factor counselling hesitation and declared the Civil Service Reform Act as adequate

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*/ Respondents raise this issue despite the restrictions of Supreme Court Rule 34.1(a).

substitute. *Bush, supra* 576-77.

There is nothing in the case law that suggests the special relationship of government employment denies a damage remedy altogether. Indeed, *Bush, id.* at 576, cites *Pickering* for the existence of the special relationship. But *Pickering, supra,* 391 U.S. at 568, established a balancing test to determine judicial oversight of First Amendment claims, not a prohibition.

The *Bush* analysis of alternative remedies ignores major portions of *Carlson* which rejected an alternative remedy under the Federal Tort Claims Act as inadequate for failure to include damages and a jury trial. *Carlson, supra,* 446 U.S. at 21 and 446 U.S. at 28n.1 (Powell, J., concurring).[8/] In fact, only damages can

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[8/] Significantly, *Bush* is premised on the carefully constructed system of congressional control of the civil service system. *Bush, supra,* 647 F.2d at 576.

provide an adequate substitute remedy for respondent. The ineffectiveness of reinstatement as an equivalent remedy is clear in light of respondent's eight year fight -- since he "won" administrative relief -- to regain a job equivalent to the one he lost in retaliation for whistleblowing. *See Fitzgerald v. Hampton*, No. 76-1486 (D.D.C. Mar. 3, 1981).

Finally, administrative relief would not provide respondent a comprehensive remedy. It would not compensate him for over $500,000 legal fees incurred for which administrative relief is unavailable. *Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977). It would not compensate him for the emotional damage he has suffered due to twelve

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That same argument squarely defeats petitioners' claim that civil service personnel actions are a presidential function.

years of isolation and professional harassment. The courts are capable of assessing the relevant measure of relief for this type of personal nightmare. *Carey v. Piphus, supra,* 435 U.S. at 263-64.

Finally, only damages can compensate respondent for unconscionable preconditions for retaining his job. It is important to remember that respondent Fitzgerald was fired merely for telling the truth to a congressional committee. Had he been under oath, apparently he would have been expected to incur criminal liability. Even in the absence of criminal sanctions, the price of continuing his career was to violate his duty to the public as a government employee. *See Swaaley v. United States,* 376 F.2d 857, 865 (Ct. Cl. 1967); *Downs v. Conway School District,* 328 F. Supp. 338, 348 (E.D. Ark. 1971).

When respondent testified in 1968 he

was fulfilling a duty Congress first recognized 23 years ago in the Code of Ethics for Government Service, H.R. Con. Res. 175, 72 Stat. B12 (1958):[9/]

> Any Person in Government Service Should:
>
> Put loyalty to the highest moral principles and to country above loyalty to persons, parties or Government department.
>
> UPHOLD The Constitution, laws, and legal regulations of the United States and all governments therein and never be a party to their evasion.
>
> * * *
>
> SEEK to find and employ more efficient and economical ways of getting tasks accomplished.
>
> * * *
>
> EXPOSE corruption wherever discovered.
>
> UPHOLD these principles, ever conscious that public office is a public trust.

Forcing a government employee to desert his or her duty to the public is a

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[9/] Last year the Code was enacted into law. PL 96-303 (July 3, 1980).

fundamental invasion of human dignity. Reinstatement cannot compensate for the humiliating choice between career and conscience forced upon government employees. As Justice Harlan stated in *Bivens, supra,* 403 U.S. at 410 (Harlan, J. concurring), "For people in Bivens' shoes, it is damages or nothing."

C. Damages are essential for the public goal of deterring future constitutional violations.

Butz explicitly recognized that damages are necessary to "in any degree deter federal officials from committing constitutional wrongs." *Butz,supra,* 438 U.S. at 505. In a related context, *Carlson* cited deterrence and individual liability in rejecting the FTCA as an adequate substitute for a *Bivens* action. "Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than

the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect..." *Carlson v. Green, supra,* 446 U.S. at 21(1980) (citations omitted).

The necessity to deter repeat performances of the nightmare respondent Fitzgerald endured is a decisive factor mandating damages. Without the threat of liability, at worst an unscrupulous President may not succeed in muzzling or punishing a forthright employee.[10/]

[10/] Even the reference in *Bush* to the Civil Service Reform Act would leave a loophole for presidential accountability. At best it would abdicate the deterrence goal of Butz. While the Reform Act contains an adjudicatory process theoretically to discipline those who violate the merit system, 5 U.S.C. §1206(g)(1), complaints against presidential advisors would bypass the system and go directly to the President, 5 U.S.C. §1206(g)(2). Since the advisors conceivably could be engaging in First Amendment retaliations at the Presidents direction, there is little structural guarentee for accountability. Of decisive

D. Damages are necessary to neutralize the chilling factors of presidential power and uncertain First Amendment coverage.

Despite the public value of whistleblowing, most government employees are afraid to tell the truth.[11/] That is hardly surprising in light of respondent Fitzgerald's experience. He has accomplished a series of pyrrhic victories but has not yet reattained a meaningful job at the Pentagon, let alone his former position . They observe the cruel

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significance, there is *nowhere* to file an administrative complaint for presidential retaliation. The courts are the *only* forum available for plaintiffs to pursue any remedy against presidential reprisals, or where liability can deter future abuses.

11/ A recent survey of federal employees by the Merit Systems Protection Board found that 96% definitely or probably approved of whistleblowing and 45% had personally observed or obtained direct evidence of illegal or wasteful practices. Almost one-fourth (23%) claimed personal knowledge of fraud or waste involving more than $1,000 of government assets while 9% set the figure in excess of $100,000. Yet, less than 20% of employees took the initiative to make an official

joke of statutory civil service reform. *See Civil Service Reform Oversight, 1981 -- Whistleblower: Hearings before the Subcommittee on Civil Service of the House Post Office Committee,* 96th Cong., 2d Sess. 80-151 (1980). They are faced with the uncertainty of satisfying the tests for constitutionally-protected speech:

> At once it becomes impossible, as Justice Marshall himself acknowledged, to formulate any workable standard of judgment. Thus a government employee cannot conceivably know in advance how much weight should be given to the circumstance that he may have a specially "informed and definite opinion" about the issue, or that the agency could "easily have rebutted" his errors.

J. Emerson, *supra*, at 581. And surely federal employees need no reminders of the awesome power of the presidency.

In short, while whistleblowing strongly

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report of the misconduct. Merit Systems Protection Board Office of Merit Systems Review and Studies, *Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismanagement?* (April, 1981).

serves the public interest, employees will remain hesitant to exercise the First Amendment in light of the risks inherent in asserting their rights and consciences. In order to follow their consciences, whistleblowers must gamble their careers and their financial security. The chilling effect is severe, to say the least.

The Court can minimize these deterrents against honesty by offering damages to employees unconstitutionally victimized by those with the most power to abuse, the President and his senior advisors. In that way, whistleblowers at least would have the possibility of eventual financial recoupment for a lost career. In light of the miserable failure of statutory civil service reform, however, closing the door on damages may effectively silence the bureaucracy.

CONCLUSION

Petitioners' claim for absolute immunity asserts that any presidential actions are unreviewable by the courts. Extension of absolute immunity to petitioners would place the fiat of these officials above the Constitution. Freedom of expression by public employees is "absolutely essential" for the effective functioning of government. No case could illustrate more vividly than respondent's that the value of exposing a $2 billion cost overrun dwarfs the claim of any individual to ignore with impunity the Constitution, the civil service system, and the public interest. The words of Lord Acton have no less force today. "Power tends to corrupt and absolute power corrupts absolutely." The decision of the court of appeals should be affirmed.

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OCT 30 1981

Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW and ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SENATOR ORRIN G. HATCH AND REPRESENTATIVES JOHN D. DINGELL, ROBERT K. DORNAN, BARNEY FRANK, ALBERT GORE, JR., A. TOBY MOFFETT AND PATRICIA SCHROEDER, MEMBERS OF CONGRESS, IN SUPPORT OF RESPONDENT

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The above named Members of Congress move this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support of this Motion, *Amici* state:

1. All of the above named persons are current Members of the United States Senate or House of Representatives.

2. One of the most crucial concerns to Members of Congress is Congress' ability to obtain information critical to its oversight and investigative function.

3. Essential to Congress' concern is that no federal official, including the President, can, with impunity, interfere with the testimony of Congressional witnesses.

4. Petitioners argue that they are immune from liability in this case by virtue of the nature of their former positions in the executive branch. Under their theory of the case, even if they were directly responsible for Respondent's discharge, even if their motivation was punitive, and even if their conduct was designed to intimidate others from giving candid testimony to Congress, Respondent would still have no cause of action. Congress cannot effectively perform its Constitutional role if high executive branch officials are left free to intimidate employees from the executive branch whose testimony Congress requires.

5. *Amici* have received consent from counsel for Respondent Fitzgerald and counsel for Petitioners Harlow and Butterfield to file this brief. However, counsel to Petitioner Nixon has declined to provide such consent.

For the foregoing reasons, the above named Members of Congress respectfully request that their Motion for leave to file the annexed *amicus curiae* brief, be granted.

Respectfully submitted,

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INTEREST OF AMICI

This brief is submitted on behalf of current Members of the United States Congress. Congress has a Constitutional duty to make all laws that are necessary and proper, to oversee the execution of its laws by the execu-

tive branch, and to inform itself about the workings of every facet of government. Resolution of the central issue in this case—the degree of immunity from suit possessed by executive branch officials who violate the law and interfere with Congress' duties—has broad implications for our system of separation of powers, and could greatly affect the ability of Congress to carry out its Constitutional role. As Members of Congress, *Amici* have a strong interest in seeing that all executive branch officials, can be held accountable when they retaliate against a Congressional witness.

SUMMARY OF ARGUMENT

This brief points out the threat to the Constitutional role of Congress posed by Petitioners' contention that an individual has no judicial remedy against former high ranking executive officials who violate his Constitutional and statutory rights by punishing him for testifying before Congress.

Although no statute explicitly confers a private cause of action upon the Respondent, he has implied causes of action under both the Constitution and federal statutes. There is no basis for Petitioners' view that deliberate violations of Respondent's First Amendment rights of free speech and petition are not judicially cognizable. A private cause of action also exists under federal civil and criminal statutes enacted by Congress to prevent interference by executive officials with the testimony of government employees.

Finally, Petitioners do not enjoy absolute immunity from personal liability for intentional violations of the Constitutional and statutory rights of a Congressional witness. Petitioners are not entitled to any immunity at all because the immunity doctrine is inapplicable to conduct, such as interference with a Congressional witness, which transgresses clear statutory boundaries on the scope of Petitioners' former authority. In any event, Petitioners are entitled to no more than qualified immu-

nity. Given the countervailing interest of Congress, Petitioners cannot possibly satisfy their burden to show that public policy *requires* the extraordinary defense of absolute immunity, especially since qualified immunity provides ample safeguards to the effectiveness of the Presidency. Nor should Petitioners be afforded a special new grant of absolute immunity because of their former status or rank. This Court has expressly rejected this rationale for absolute immunity and an analysis of the historical and Constitutional underpinnings of executive immunity, as well as its function, mandates that there be no departure in this case from the general rule of qualified executive immunity.

ARGUMENT

I. A JUDICIAL REMEDY IS CRITICAL IN THIS CASE TO PROTECT CONGRESSIONAL FUNCTIONS

The ability of Congress to carry out its Constitutionally mandated responsibilities to enact laws and to oversee their execution could be crippled if this Court were to hold that there is no judicial remedy for Petitioners' alleged retaliation against a Congressional witness. For if, as Petitioners assert, high executive branch officials possess absolute immunity, even when they wrongfully dismiss a government employee solely because that employee has exercised his or her Constitutional right of free speech and testified before Congress at its request, then those officials may successfully deny Congress access to the only sources of information—government employees—who are knowledgeable about executive branch misconduct. Money damages for injuries suffered by a Congressional witness are necessary to insure forthright disclosure because no other remedy provides adequate compensation. In addition, money damages are an essential deterrent to wrongful executive intrusion into the legislative process.

A. The Importance of Congressional Oversight and Investigation

The power, and indeed the duty, of Congress to conduct inquiries into the operations of the executive branch of government, has long been recognized.[1] *See McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927). These inquiries may be in connection with proposed or existing legislation, and such legislative inquiries are an established part of representative government. *Tenney* v. *Brandhove* 341 U.S. 367, 377 (1951). This Court has noted that:

> the power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or

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[1] Former Senator Sam J. Ervin, Jr., has stressed the critical nature of Congressional oversight of executive branch operations, stating:

> Of considerable importance is Congress' power to investigate the executive branch. We do not live in a monarchy but in a democracy where government functions are shared by three equal branches. The White House is the people's house, not an imperial palace. The executive branch is not above the law. It cannot autocratically and arbitrarily block Congress from inquiring into its operations.
>
> The Constitution and statutes give Congress a solemn duty to oversee the activities of the executive branch. How else can Congress fully comprehend whether existing laws are adequate and properly administered? How else can Congress determine with confidence what specific additional laws are needed to guide the nation?
>
> The President should not be allowed to emasculate the oversight function by sweeping assertions of executive privilege. Nor should the courts establish judicial precedents that seriously debilitate this responsibility. All branches of government must fully appreciate that the oversight function is a vital tool for keeping the nation free. It is a shield against creeping executive imperialism of the sort that unfortunately our nation has witnessed in the recent past. Ervin, *Introduction* to J. Hamilton, *The Power to Probe*, at xiii (1977).

> possibly needed statutes. It includes surveys of defects in the social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal government to expose corruption, inefficiency or waste.

Watkins v. *United States*, 354 U.S. 178, 187 (1957); *accord*, *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1958).

However, Congressional factfinding need not be directly tied to legislation, for even apart from its duty to conduct investigations in connection with legislation, Congress has an independent duty to inform itself about the workings of every facet of the government. The Court, quoting Woodrow Wilson, has referred to this informing function as "indispensible":

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.

United States v. *Rumely*, 345 U.S. 41, 43 (1953) (*quoting* Wilson, *Congressional Government* 303). *See also* *Watkins* v. *United States*, 354 U.S. 178, 200 and n.33 (1957).

Yet, often Congress does not have the facts required to carry out its responsibilities. In the landmark case

of *McGrain* v. *Daugherty*, 273 U.S. 135, 174-75 (1927), this Court recognized that:

> [a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it.

Accord, *Barenblatt* v. *United States*, 380 U.S. 109, 111 (1958).

It is undisputed that the investigation into cost overruns on the C-5A transport plane was a legitimate exercise of Congress' Constitutional responsibilities under both its "legislative" and "informing" functions.[2] But, the only sources of information relating to the cost overruns authorized by the executive branch were the government officials, such as A. Ernest Fitzgerald, responsible for reviewing the program. In retrospect, it is clear that without his testimony, the enormous "corruption, inefficiency or waste", *Watkins*, *supra*, 354 U.S. at 187, that occurred would never have been brought to the public's attention.

Petitioners would have this Court establish a legal precedent that could defeat Congress' ability to function as a co-equal branch of government, in both its legislative and informing roles, by precluding any judicial scrutiny of executive branch misconduct. High executive offi-

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[2] There has been no suggestion whatsoever that Fitzgerald's testimony in any way compromised any national defense or security interests. Fitzgerald's testimony was given with the explicit authorization of the Department of Defense. *See Economics of Military Procurement, Hearings Before the Subcommittee on Economy In Government of the Joint Economic Committee*, 90th Cong., 2d Sess. 199-200 (1968-1969). Furthermore, this case involves restrictions on factual information desired by Congress, and not the President's discretion to develop and promulgate national policy.

cials would be free to threaten "whistleblowers" with dismissal, effectively chilling their First Amendment rights to free speech and to petition the Congress for redress of grievances.

The mere threat that civil servants could lose their jobs for providing factual information to Congress would inhibit any but the most courageous individuals. Although an employee might ultimately regain a lost job, the time and expense involved in doing so is substantial, and involves a risk that few, if any, would take. Moreover, reinstatement alone will never deter the improper dismissal of a whistleblower since the individual responsible for the dismissal is not penalized; in fact, he is often long gone from office before corrective action can be taken.

By far the better course is to allow suits for money damages. In this manner the Constitutional role of Congress will be preserved without impairing the Presidency, and the compensatory and deterrent effect of money damages will preclude the improper silencing of future Ernest Fitzgeralds.

B. Other Remedies are Inadequate or Unavailable

While there are other remedies which may, in some situations, assist the improperly dismissed employee, these remedies are not completely adequate [3] and do not safeguard Congress.

Two remedies that would theoretically serve as deterrents are as a practical matter ineffective. These remedies therefore do nothing to reduce the chilling effect on

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[3] The inability of other remedies adequately to protect whistleblowers who testify before Congress is described in *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption*, Senate Committee on Governmental Affairs, 95th Cong., 2d Sess. 8, 22 (Comm. Print 1978).

federal employees that fear of dismissal creates. First, Congress has the impeachment process available to it for Presidential misconduct amounting to "high crimes and misdemeanors." But invocation of such an extreme remedy for the dismissal of one individual, even when the dismissal was contrary to law, is extraordinarily improbable. Impeachment is a remedy more properly held in reserve for misconduct that affects the public at large. *See* IV J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 48, 113 (1836). Second, it is a felony to interfere with a witness before a Congressional panel. 18 U.S.C. § 1505. However, prosecution for this crime rests in the hands of the Department of Justice. It is entirely unrealistic to expect the Attorney General to bring criminal felony charges against the President or one of his aides for the dismissal of a single government bureaucrat; the executive branch, as a practical matter, will not and probably cannot investigate and prosecute itself on such a matter.[4] Not only do both of these remedies fail as an effective deterrent but neither addresses the need to compensate the harmed witness.

In fact, there are no other remedies available that fully compensate the improperly dismissed employee. As Petitioners concede, the protections under the Civil Service rule and regulations were unavailable to Fitzgerald because he was in the "excepted service." Brief for Pets. Harlow & Butterfield at 24.[5] Nor is the Civil Service

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[4] It is, of course, questionable whether a sitting President can be subjected to criminal penalties. Nixon v. Sirica, 487 F.2d 700, 756-58 (D.C. Cir. 1973) (Mackinnon, J., concurring).

[5] Yet, they maintain Fitzgerald's right to an implied cause of action must be limited because Fitzgerald was entitled to certain administrative remedies under the Veterans Preference Act of 1944, 58 Stat. 387. Petitioners thereby implicitly concede that non-veterans have an implied cause of action. It is simply inconceivable that Congress, in passing a law designed to provide

Reform Act of 1978 available to provide relief. That Act makes the improper dismissal of a whistleblower a "prohibited personnel practice," 5 U.S.C. § 2302(b)(8), and authorizes the appointment of a Special Counsel to investigate such dismissals and to recommend to the Merit Systems Protection Board appropriate remedial action, which may include removal from federal service of the offending official. 5 U.S.C. § 1207(b). However, remedial action under the statute, for quite sound Constitutional reasons, is not provided where the offenders are the President or his political appointees, such as Petitioners here. 5 U.S.C. § 1206(g)(2). This could lead to the anomalous situation where the individual who carries out the President's improper dismissal of a federal employee could himself be removed from office, but the President or Presidential aide who issues the order to fire the employee could remain untouched. *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided Court*, 101 S.Ct. 3132 (1981).

We do not suggest that it is appropriate to impeach, indict or remove a President or his top aides for the offenses alleged in this case, standing alone. Surely, the respect that must be accorded the Office of the President and the special nature of his duties require that such extreme remedies be applied only in the most egregious situations. But the unavailability of extreme remedies does not mean that a less drastic remedy like money damages should also be unavailable in all cases.

Damages are hardly an extraordinary remedy; they are traditionally available in federal court for violation of individual rights. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). A suit for damages will not disrupt the Chief Executive's ability to carry out his Constitu-

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additional protection for veterans returning from World War II, would have provided them with a remedy less meaningful than that available to everyone else.

tional functions in the way an impeachment or a criminal prosecution would. Damages would, however, deter the improper dismissal of federal employees, as well as compensate the victim of the dismissal. Consequently, only money damages adequately guarantee the full disclosure essential to the effectiveness of Congress.

II. AN IMPLIED CAUSE OF ACTION EXISTS UNDER THE CONSTITUTION

Petitioners' assertion that Respondent has no implied cause of action to challenge the violation of his Constitutional rights, *see* Brief for Pets. Harlow & Butterfield at 21-26, is simply incorrect.[6]

Beginning with *Bivens*, this Court has repeatedly recognized that victims of a Constitutional violation by federal officials have the right to recover damages against the official in federal court despite the absence of any statute conferring such a right. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Carlson* v. *Green*, 446 U.S. 14 (1980).[7] A *Bivens* action may only be defeated where: (1) defendants demonstrate that Congress has provided an alternative

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[6] We take no position on whether this issue is properly before the Court, but are responding to arguments advanced by Petitioners Harlow and Butterfield that, if accepted, could adversely affect Congress.

[7] Although *Bivens*, *Davis*, and *Carlson* established implied causes of action under the Fourth, Fifth and Eighth Amendments, respectively, there is no functional difference that would justify a contrary result where a violation of First Amendment rights occur. Implied causes of action under the First Amendment have been recognized in at least five circuits. *See* Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Rosado v. Santiago, 562 F.2d 114, 117 (1st Cir. 1977); Paton v. LaPrade, 524 F.2d 862, 869-71 (3d Cir. 1975); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975), *cert. denied*, 439 U.S. 983 (1978); Trapnell v. Riggsdy, 622 F.2d 290, 294 (7th Cir. 1980).

remedy which it *explicitly* declared to be a substitute for recovery directly under the Constitution and which it viewed as equally effective, or (2) in the absence of affirmative action by Congress, defendants demonstrate "special factors counseling hesitation," *Carlson*, *supra*, 446 U.S. at 18; *Bivens*, *supra*, 403 U.S. at 396-97; *Davis*, *supra*, 442 U.S. at 245-47. Neither of the factors necessary to defeat a *Bivens* action is present here.

A. Congress Never Explicitly Provided an Equally Effective Substitute Remedy

Fitzgerald's *Bivens* action cannot be defeated by arguing that Congress explicitly provided a substitute remedy it viewed to be equally effective as an implied Constitutional cause of action. Congress never did so. Nor does the existence of related statutory causes of action defeat Fitzgerald's claim. *Carlson*, *supra*, 446 U.S. at 19. In *Carlson*, this Court recognized a number of factors, three of which are clearly also present in this case, that suggest that a related statutory remedy does not bar an implied Constitutional cause of action under *Bivens*.

First, *Carlson* pointed out that an implied Constitutional cause of action, in addition to compensating the victim, serves an important deterrent function. To Congress, this deterrent function is critical. In order to deter wrongful discharge or intimidation, any remedy must be directed at the individual wrongdoer. Eventual reinstatement with back pay is not directed at the offending official and will not have any deterrent effect whatsoever on any official who wishes to interfere with an employee's testimony to Congress. To encourage testimony, an employee's fear of possible dismissal must be eliminated; the knowledge that lengthy administrative procedures exist that may eventually result in vindication will not suffice.[8] In addition, the criminal penalties

[8] A recent survey of federal employees by the Merit Systems Protection Board showed that "[t]here is general uncertainty about the adequacy of whistleblower protections, but most of those who venture an opinion believe they are inadequate" and that

and the threat of impeachment do not deter the harassment of an individual employee; if they did, the conduct which led to this action would never have occurred. But damages recoverable from an individual almost certainly would have a deterrent effect. *Carlson, supra,* 446 U.S. at 21.

Second, *Carlson* indicates that, unless punitive damages are available under an alternative scheme, an implied Constitutional cause of action would be the preferred method of proceeding, because punitive damages are "especially appropriate to redress the violation by a government official of a citizen's Constitutional rights." *Id.* at 22.

Third, alternative remedies do not preserve an individual's Seventh Amendment right to a jury trial. *Id.*

B. There Are No "Special Factors"

An implied cause of action under the Constitution may also be defeated if there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Carlson, supra,* 446 U.S. at 19. Although it is unclear precisely what would constitute a "special factor" sufficient to defeat a *Bivens* action, this Court has taken a narrow, rather than expansive view in defining the scope of the term. In *Davis* v. *Passman, supra,* it was held that in a suit against a Congressman for alleged unconstitutional employment practices, those special factors which the Court was bound to consider did not extend further than the limits of the Speech or

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"[e]mployees express general skepticism about the very possibility of their being effectively protected against reprisals." Merit Systems Protection Board, *Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismanagement?* 4, 5 (1981). Respondent Fitzgerald's own experience shows the inadequacy of the existing remedies. This Spring, nearly twelve years after his firing and eight years after he was ordered to be reinstated, the district court found that he had still not been reinstated to an equivalent position. Fitzgerald v. Hampton, No. 76-1486 (D.D.C. March 3, 1981).

Debate Clause of the Constitution.[9] 442 U.S. at 246. Beyond the Speech or Debate Clause, Members of Congress, despite their special status as legislators, were subject to suit as are ordinary persons. *Id.*, *citing Gravel* v. *United States*, 408 U.S. 606, 615 (1972).

Similarly, the position of Petitioners in the executive branch is not in itself, in the absence of an express Constitutional provision, a "special factor." Presidents are clearly amenable to judicial process. As the Court noted long ago, and recently affirmed:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. *Lee*, 106 U.S. 196, 220 (1882), *quoted in Davis* v. *Passman*, 442 U.S. 228, 246 (1979).

Moreover, Petitioners' cannot persuasively argue that the possibility that officials might be inhibited from the legitimate exercise of their responsibilities by fear of liability is a "special factor."[10] *Carlson, supra* at 19. This policy question may be an appropriate concern in determining the degree of immunity Petitioners might possess; however, it is inappropriate in determining

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[9] Some Members of Congress believe that the Speech or Debate Clause itself was too narrowly interpreted in this case. Whatever the merits of *Davis*, or the applicability of its particular circumstances to other cases that may arise, it is nevertheless correct to state that only Congress can enjoy its provisions. There is no express Constitutional doctrine analogous to the Speech or Debate Clause applicable to the executive branch.

[10] Petitioners, unless they acted entirely outside the scope of their authority, possess qualified immunity under Butz v. Economou, 438 U.S. 478 (1978), which should provide more than adequate protection. Only where, as here, it can be factually demonstrated that the President and his top aides had direct personal involvement in a violation of Constitutional or statutory rights, is a lawsuit naming such individuals as defendants likely to survive a motion to dismiss or for summary judgment.

whether Respondent has a cause of action in the first place. As this Court said, "[a] federal official contemplating unconstitutional conduct . . . must be prepared to face the prospect of a *Bivens* action." *Id.* at 25.

Petitioners rely on the Fifth Circuit's decision in *Bush* v. *Lucas*, for the proposition that the government's need to manage its personnel efficiently is sufficient to constitute a special factor defeating an implied cause of action. 647 F.2d 573 (5th Cir.) *cert. pending*, 40 U.S.L.W. 3176 (Sept. 4, 1981) (No. 81-469). To reach that result, the court in *Bush* v. *Lucas* misapplied this Court's decisions in *Bivens* and *Carlson*.[11] There is no reason to believe that executive action in the personnel area is unreviewable. *See Service* v. *Dulles*, 354 U.S. 363 (1957). *See also Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981). The argument for reviewability is particularly strong, where, as here and unlike *Bush*, the personnel action was taken by officials who are far removed from the normal chain of command and who acted in direct

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[11] *See also* Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980), where it was said that existence of remedies under the Civil Service Act providing for reinstatement and back pay were a special factor, precluding relief under the Constitution. The court there also misapplied *Bivens*. In any event, both *Bush* and *Bishop* are distinguishable. *See infra*. Under *Carlson*, a *Bivens* claim will be dismissed if there is an explicit Congressional determination that an alternative remedy was intended to substitute for and provide an equally effective remedy as recovery under the Constitution. Neither court found that Congress explicitly intended the Civil Service Laws to be such an alternative. Having failed to do so, however, the *Bush* and *Bishop* courts strained to fit within the other prong of the *Carlson* analysis, "special factors counseling hesitation." Instead of focusing on whether there existed an equally effective substitute, these courts believe it sufficient to defeat a *Bivens* claim that there is any substitute at all. If *Bush* and *Bishop* are good law, then the test enunciated by this Court in *Bivens* and *Carlson* will have been effectively reduced from two prongs to one. No purpose can be served in examining Congressional intent surrounding a particular statutory remedy if the statute, rejected as a substitute for a *Bivens* remedy, can still be considered a "special factor" precluding a *Bivens* remedy.

contravention of at least two statutes. 5 U.S.C. § 7211; 18 U.S.C. § 1505.

Finally, even if there are "special factors," they are irrelevant, since there has been ample affirmative action by Congress. Time and time again Congress has tried to impress upon the executive branch the importance with which it views the need to receive testimony from federal employees, free from executive branch reprisals. *See, e.g.*, 5 U.S.C. § 7211; 18 U.S.C. § 1505; 5 U.S.C. § 2302(b)(8). Retaliation against a witness like Fitzgerald harms not only the individual but erodes the foundation of our democratic system of government.

III. AN IMPLIED CAUSE OF ACTION EXISTS UNDER A FEDERAL STATUTE

The central question in determining whether a private cause of action should be implied from a federal statute is whether Congress *intended*, implicitly or explicitly, to confer a private right to bring suit.[12] *Middle-*

[12] The Court has identified four factors to aid in determining whether Congress intended to create a private right of action:

> First, is the plaintiff "one of the class for whose special benefit the statute was enacted," . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And, finally, is the cause of action one traditionally delegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (emphasis in original omitted). A private right of action under 5 U.S.C. § 7211 satisfies these four factors: First, the statute creates a federal right for federal employees, including Mr. Fitzgerald; second, the legislative history indicates that Congress intended, implicitly, a private right of action; third, private suits are not only consistent with but necessary to the Congressional purposes of deterring Presidential interference with the rights established in the statute; and, fourth, no state concern is implicated by this case.

sex County Sewage Authority v. *National Sea Clammers Ass'n*, 102 S.Ct. 2615, 2622 (1981); *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 101 S.Ct. 2061, 2066 (1981); *California* v. *Sierra Club*, 101 S.Ct. 1775, 1779 (1981). Legislative intent "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). The language, legislative history and structure of 5 U.S.C. § 7211 all demonstrate that Congress intended to create a private right of action.

Section 7211 of Title 5 provides, in relevant part, "[t]he *right* of employees, individually or collectively, to petition Congress . . . or to furnish information . . . may not be interfered with or denied." This language clearly confers a federal right on a class of persons—federal employees—to which Fitzgerald belongs. And it explicitly confers that right on *each* of them, "individually." As this Court has noted:

> [n]ot surprisingly, the right—or duty—creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

Canon v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Not only does this language on its face conclusively confer on federal employees the right to testify before Congress without reprisal, but it is similar to language used in other statutes under which this Court has implied private rights of action.[13] *See Johnson* v.

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[13] The Court has indicated that, "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action

Railway Express Agency, Inc., 421 U.S. 454 (1975) (42 U.S.C. § 1981); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969) (42 U.S.C. § 1982); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) (42 U.S.C. § 973(c)). *See also Canon, supra*, 441 U.S. 677 (1979) (20 U.S.C. § 1681).

The legislative history also demonstrates that Congress intended to create a private right of action under 5 U.S.C § 7211. The statute was originally part of the Post Office Appropriations Bill of 1912, which represented a Congressional response to a Presidential order [14] prohibiting federal employees from testifying directly to Congress. Ch. 389, § 6, 37 Stat. 539. Contrary to Petitioners' assertion that the bill's primary purpose was to protect the legislative process, Brief for Pets. Harlow & Butterfield at 26, the real concern in Congress was that the rights of federal employees under the First Amendment to free speech were being violated.[15] *See*

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would be controlling." *Cort, supra*, 442 U.S. at 82; *Transamerica, supra*, 444 U.S. at 23; *Canon, supra*, 441 U.S. at 694. In such situations, unless Congress explicitly denied a private right of action it is untenable to presume that Congress provided a right without a remedy.

[14] *See* Exec. Order No. 1142 (Nov. 26, 1909).

[15] This concern was clearly indicated by the remarks of Representative Rouse:

> This bill was for the purpose of placing all employees on the same footing with all American citizens and giving to these employees the right of free speech and petition—that which has been taken from them and denied to them by orders which have been issued by the several departments and which has been more strictly enforced by the post-office authorities . . . it gives to them the right to present grievances to Congress or any Member thereof, and should an employee avail himself of this opportunity it shall not be cause for a reduction in rank, compensation, or removal from the service. This provision simply places all employees on the same footing with all other American citizens which should never have been otherwise, and restores to them the rights guaranteed by the Constitution.

48 Cong. Rec. 5080 (1912).

S. Rep. No. 388, 62d Cong., 2d Sess. 11 (1912). In addition, Congress was concerned that information about executive departments, and possible abuses, was not available from the best sources, the employees of those departments. *See* 48 Cong. Rec. 4653 (1912) (remarks of Rep. Calder); *id.* at 4693 (remarks of Rep. Moon); *id.* at 5000 (remarks of Rep. Austin); *id.* at 5157 (remarks of Rep. Evans).

As enacted, the statute makes it a violation of federal law to impede in any way the right of a federal employee to testify before Congress. Congress enacted the statute specifically to restrain the President and high executive officials who were interfering with the ability of federal employees to communicate with Congress. Congress specifically intended to prevent the President from doing what he did in this case. It is inconsistent with this legislative intent to deny Fitzgerald a private right of action.

Finally, the structure of section 7211 indicates that Congress intended to create a private cause of action. Section 7211 does not itself contain an enforcement mechanism and at the time of its enactment no other provision offered any remedy to Congressional witnesses.[16] Thus, if it did not establish a private cause of action,

[16] The criminal penalties of 18 U.S.C. § 1505 were enacted in 1940. This provision also contains an implied private cause of action. In *Cort* v. *Ash*, this Court recognized that the possibility of a criminal penalty does not necessarily preclude implication of a private cause of action for damages. 442 U.S. at 79. Section 1505 is not a "bare criminal statute" aimed at protecting the public at large; rather, it is sufficiently protective of a special group—witnesses before government instrumentalities—to give rise to a private cause of action by a member of that group. 442 U.S. at 80. This statute, like section 7211, grew out of a Congressional concern that witnesses be able to testify free from reprisal. H.R. Rep. No. 1143, 76th Cong., 1st Sess. 1 (1940). And where, as here, the defendant is the President, an implied cause of action is essential to implement the policy of the statute for all of the reasons stated above.

section 7211 was just an empty declaration in the air. It cannot be that this was all that Congress intended in enacting that law.

IV. EXECUTIVE OFFICIALS WHO PUNISH A GOVERNMENT EMPLOYEE FOR HIS TRUTHFUL TESTIMONY BEFORE CONGRESS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

The appropriate scope of immunity for top-level officials in the executive branch should not be decided without regard to the serious problem absolute immunity poses for the Constitutional role of Congress. Petitioners' arguments in favor of absolute immunity are couched solely in terms of the isolated interests of the Presidency and completely ignore how such a role of insulated executive autonomy would jeopardize the effectiveness of Congress and undermine the Constitutional system of separation of powers.

Petitioners ask this court to establish a broad and dangerous new precedent by extending the existing doctrine of official immunity in two ways. First, they seek immunity for activities which are clearly beyond the outer perimeter of executive power; until now the immunity doctrine has been invoked exclusively to protect officials for conduct within the scope of their authority. Second, while executive officials have heretofore been entitled to the ample protection afforded by qualified immunity, Petitioners maintain that they should be bestowed, solely by virtue of their important positions within the executive branch, with a mantle of absolute immunity. Expansion of the immunity doctrine is, we submit, unwarranted because it is unnecessary to protect the claimed prerogatives of the Presidency and would frustrate the ability of Congress to perform its essential oversight and legislative functions. The competing executive and legislative interests involved in this case cannot be reconciled by providing Petitioners with absolute immunity.

A. The Immunity Defense is Unavailable to Executive Officials Who Act Outside The Scope of Their Authority by Interfering with A Congressional Witness

Notwithstanding the justifications for the doctrine of official immunity,[17] the immunity defense is only applicable to an official's action taken within the scope of his authority. *Butz* v. *Economou*, 438 U.S. 478, 489-91 (1978). The rule has long prevailed that a federal official may not with impunity ignore the "jurisdictional" limitations which the controlling law has placed on his powers. *Id.* at 489. This Court has never purported to grant immunity of any kind to any official who has manifestly or palpably overreached his authority or wrongfully exceeded clear Constitutional or statutory boundaries on the proper exercise of his authority, and there is no valid reason to do so. *Id.* In short, the doctrine of official immunity is utterly unavailable when a government figure has "wandered completely off the official reservation." *See id.* at 519 (Rehnquist J., concurring in part, and dissenting in part).

All of Petitioners' arguments that they deserve the benefits of absolute immunity ignore the threshold question of whether they are entitled to even qualified immunity, since their misconduct, although occurring while Petitioners were members of the executive branch, was

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[17] There are three generally accepted rationales for official immunity. The first is the unfairness of penalizing an official for activity he is required to take because of the legal obligations of his position. The second is the deterrence of able people from holding public office and the fear of dampening "the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." The third is the distraction of officials from the public business by the time and effort needed for defending lawsuits. Scheuer v. Rhodes, 416 U.S. 232 (1974); Gregoire v. Biddle, 177 F.2d 579, 581 (3d Cir. 1949). *See* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and Critique*, 72 Nw.L.Rev. 526 (1978).

not within the farthest reaches of a legitimate exercise of Presidential power.[18]

In this case there is no immunity because the complained of conduct is both unauthorized and prohibited by statute. Petitioners did, in fact, wander "completely off the official reservation." First, Petitioners were not authorized to discharge a specific government employee in a Congressionally established department.[19] Since the alleged wrongdoing was not related to matters committed by law to Petitioners' supervision and control they cannot avail themselves of the immunity defense. *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896).

Second, and most important, even if the discharge of a particular government employee could be deemed to be otherwise authorized, the misconduct alleged in this case—termination because of the employee's Congressional testimony—is clearly beyond the scope of Presidential power because it is expressly prohibited by statute. 5 U.S.C. § 7211; 18 U.S.C. § 1505.[20] The Court's analysis of *Barr* v. *Mateo* in *Butz* v. *Economou* demonstrates that there is no immunity defense in this situation. 438 U.S. at 489. In *Barr* v. *Mateo*, the Court

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[18] The President's powers, though broad, are not limitless. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[19] While these executive officials may have general responsibilities with regard to government personnel policy within the executive branch, the forced dismissal of a single individual is not a matter committed by law to executive branch officials at the highest level. Certainly, in the course of performing their duties, Petitioners did not normally devote their attention to decisions to hire, promote, or fire particular government employees in positions comparable to the one held by Fitzgerald.

[20] When Congress exercises its power to vest appointment of an inferior officer in the head of an executive department, U.S. Const. Art. II, § 2, cl. 2, Congress may validly limit the conditions under which the officers may be removed. Myers v. United States, 272 U.S. 52 (1926); United States v. Perkins, 116 U.S. 483 (1886).

held that an official's publication of a false and damaging press release, the issuance of which was otherwise within his authority, was not itself actionable. 360 U.S. 564 (1959). But *Butz* explained that had the press release been unauthorized, "and surely if the issuance of press releases had been expressly forbidden by statute" then the claim of absolute immunity would not have been upheld. 438 U.S. at 489.

Congress has enacted statutes expressly forbidding anyone from interfering with the testimony of Congressional witnesses. Indeed section 7211 was passed specifically to prohibit Presidential interference with Congressional witnesses. This prohibited conduct also rises to the level of Constitutional violations, since it restricts the right of free speech and the right to petition Congress. If any inference is to be drawn from relevant Supreme Court precedent, it is that Petitioners are not excused from liability arising from their alleged deliberate failure to observe these well established and unambiguous statutory and Constitutional limitations on their powers. *Butz, supra*, 438 U.S. at 494; *Spalding* v. *Vilas*, 161 U.S. 483 (1896).

B. Petitioners Cannot Carry Their Burden of Establishing the Need for Absolute Immunity

Executive officials may be granted absolute immunity only if public policy requires this extraordinary exemption from personal liability, and Petitioners bear the burden of proof on that question. *Butz, supra*, 438 U.S. at 507. It is apparent that Petitioners cannot possibly satisfy this test, in part because absolute immunity leaves unprotected the vital public interest in full disclosure by Congressional witnesses. Thus, under the prevailing standard Petitioners are entitled to no more than qualified immunity even if qualified immunity would impose additional burdens on the executive branch. Realistically, qualified immunity offers very extensive protection to executive officers, and therefore, Petitioners' speculations

about its dire consequences in terms of impeding the performance of Presidential duties are unfounded.

1. *Public Policy Requires Only The Protection of Qualified Immunity*

Absolute immunity is an extraordinary defense which has only been available in narrow circumstances not analogous to the present suit.[21] Indeed, this Court has stated that absolute immunity for federal officials who knowingly and deliberately violate Constitutional rights "is contrary to the course of decision in this Court from the very early days of the Republic." *Butz, supra*, 438 U.S. at 487. Therefore, when executive officials are accused of violations of Constitutional and statutory rights, as they are here, they are generally afforded only a qualified immunity from liability.[22] *Id.* Guided by the fundamental principle that "no man in this country is so high that he is above the law," *id.* at 506, *quoting United States* v. *Lee*, 106 U.S. 196, 220 (1882), this Court has imposed a very stringent burden on those federal officials

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[21] Executive officials, unless acting in a quasi-adjudicatory capacity, have not been extended the absolute immunity afforded to judges, Pierson v. Ray, 386 U.S. 547 (1967), or prosecutors when they are functioning in a quasi-judicial capacity. Imbler v. Pachtman, 424 U.S. 409 (1976). Nor do executive officials enjoy the immunity afforded to federal lawmakers by the Speech or Debate Clause of the Constitution or to state and local legislators by case law. Tenney v. Brandhove, 341 U.S. 367 (1951); Lake Country Estates, Inc., v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). In *Halperin* v. *Kissinger*, the D.C. Circuit refused to extend the absolute immunity of legislators to the President. 606 F.2d 1192, 1213 (D.C. Cir. 1979). *See also* Prosser, *The Law of Torts*, 4th Ed. 1971, § 132 (cases collected).

[22] Petitioners advocate an irrational distinction between Constitutional and statutory causes of action, arguing that common law absolute immunity precludes suit for the intentional violation of a federal statutory right. This distinction is indefensible, and more significantly, it is not the law. Butz v. Economou, 438 U.S. at 490-494. *See* Brief for Resp. at 47. Of course, the statutes involved here were enacted to vindicate the Constitutional rights of government employees.

who seek an exception from the established rule of qualified liability. In order to justify absolute immunity, Petitioners "*must bear the burden of showing that public policy requires an exemption of that scope.*" *Butz, supra,* 438 U.S. at 507 (emphasis added).

Petitioners cannot meet this exacting standard for justifying absolute immunity. Their predictions about the adverse effects of qualified immunity are unfounded. The doctrine of qualified immunity, as articulated by this Court, provides a "sliding scale" of protection which varies according to an official's duties and the totality of the circumstances in which the official must act. *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-49 (1974). *See also Apton* v. *Wilson,* 506 F.2d 83, 93 (D.C. Cir. 1974); *Halperin* v. *Kissinger,* 606 F.2d 1192, 1212 (D.C. Cir. 1979). This immunity is necessarily very great for the President because of the broad scope of his discretion, the wide responsibilities of his office, the demands on his time and the exigent circumstances under which he frequently acts. *Kissinger, supra,* 606 F.2d at 1212. The immunity could only be pierced in the event a plaintiff could prove that the President acted with actual malice or that he failed to meet a statutory or Constitutional obligation that was clear under the circumstances or understood at the time. *Id. See Scheuer* v. *Rhodes,* 416 U.S. at 246-47.

It will be a rare case where a plaintiff can prove such facts, or even point to evidence to contradict defendants' affidavits and raise a genuine issue of material fact sufficient to survive a motion for summary judgment. But this is such a case, because the nature of the evidence, including the availability of the White House tapes, shows direct Presidential involvement and illuminates the Presidential motives. Only in such a case will qualified immunity, quite properly, fail to provide complete protection to those who abused their public trust.

Not only can Petitioners not show that public policy requires absolute immunity, but strong reasons of public

policy militate *against* their claim. First, Petitioners' extraordinary claim would enable the executive branch to control and distort the facts available to Congress, thus creating both an intrusion and an impediment to the legislative function of Congress. Furthermore, whatever credence might otherwise be given to Petitioners' concerns about the Presidency, it is inconceivable that the proffered rationale for absolute immunity has any merit with respect to the exceedingly narrow and rare type of case that is now before the court: *i.e.*, where the President is alleged to have deliberately sought to undermine the ability of another branch to perform its own Constitutional function. In these circumstances, whatever special deference might be due the Presidency in other contexts can have no controlling weight.

2. *Petitioners Are Not Entitled to Absolute Immunity By Virtue of the Nature of their Office*

Unable to satisfy the existing public policy test for justifying absolute immunity, Petitioners have attempted to argue that the President and his closest advisors are entitled, solely by virtue of their high office, to a special new grant of absolute immunity. Petitioners have taken the position that even if they were directly responsible for Fitzgerald's discharge, even if their motivation was punitive, and even if their conduct was designed to intimidate others from giving candid testimony to Congress, the President and his top-level White House personnel are nonetheless completely immune from suit because of the need to safeguard the President's executive functions. *See* Brief for Pet. Nixon at 5. But the Court has consistently rejected the notion that greater rank merits greater protection from suit. *Butz*, *supra*, 438 U.S. at 506. Rather, the Court has recognized that:

> The greater power of such [higher] officials affords a greater potential for a regime of lawless conduct. Extensive government operations offer opportunities for unconstitutional action on a massive scale.

Id. This reasoning is even more compelling in the present case, which involves not only the preservation of private rights but also the need to vindicate the public rights embodied in Congressional enactments.

Rather than determining the immunity issue according to title or status, as Petitioners advocate, the Court has instead analyzed the functions performed by officials claiming immunity. The Court, for example, concluded on the basis of this analysis that the "special functions" of judges and of prosecutors require a full exemption from liability. *Butz, supra,* 438 U.S. at 508. But the Court stressed that this exemption applied to these officials only "in the exercise of their judicial functions." [23] *Id.* The Court stated that:

> [t]he cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process . . . Absolute immunity is thus necessary to assure that judges, advocates and witnesses can perform their respective functions without harassment or intimidation . . . At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means for controlling unconstitutional conduct.

Id. at 512.[24] Executive officials functioning in quasi-

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[23] Similarly, prosecutors can be liable for damages arising out of actions unrelated to their prosecutorial functions, such as arranging for mass arrests. Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974). *See* Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976); Martin v. Merola, 532 F.2d 191 (2d Cir. 1976) (issuing press releases). And legislators are not immune for conduct that is not part of their legislative activities. Davis v. Passman, *supra*; Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[24] Judges to varying degrees are insulated from political pressure, governed by precedent, and subject to review and reversal on appeal. Pierson v. Ray, 386 U.S. 547, 554 (1967); Stump v. Sparkman, 435 U.S. 349, 369-70 (1978) (Powell, J., dissent-

judicial roles have also been afforded absolute judicial immunity because there are safeguards in agency adjudications similar to those found in traditional litigation. *See id.* at 512-17. In comparison to these executive adjudicators, the actions of the executive officials named in this lawsuit were virtually irreversible.

In each case where the special functions of an official have been found to require absolute immunity, the Court has undertaken "a considered inquiry into the immunity historically afforded the relevant official at common law and the interest behind it." *Id.* at 508; *Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976). This approach also does not reveal any basis for the new precedent Petitioners desire. Judges [25] and legislators [26] had long been accorded absolute immunity at common law. In contrast, private actions for damages against executive officials were recognized at common law as an important means for redress of individual wrongs.[27] *See Payton* v. *New*

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ing); Apton v. Wilson, 506 F.2d 83, 93-94 (D.C. Cir. 1974). Prosecutors are similarly hemmed in by public adversary systems and the availability of appeal. No such restraints apply to executive action.

[25] *See* Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber 1607): The Case of the Marshalsen, 77 Eng. Rep. 1027 (C.P. 1613); Terry v. Huntington, 145 Eng. Rep. 557 (Ex. 1659). *See also* Prosser, *supra*, § 132, 987 nn. 76-77.

[26] *See* 1 W & M., Sess. 2, C.11 (1688) ("The freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of parliament.") *See also* Prosser, *supra* at 988.

[27] Of course, suits against the King were not cognizable. Under the theory of divine right and the common law "The King could do no wrong," 3 Holdsworth, *History of English Law*, 5th Ed. (1942), 458-69. But this maxim marks an obvious point of departure for history and American jurisprudence. *See* Prosser, *Law of Torts*, 4th Ed. 1971 § 131, 971. In any event, English historical antecedents are of limited relevance to the immunity inquiry. Policy grounds and not legal fictions should determine the result. *See* Freed, *supra* at 529.

York, 100 S.Ct. 1371, 1391 (1980) (White, J. dissenting); *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 (1961); *Boyd* v. *United States*, 116 U.S. 616, 624-25 (1886).

Nor is there any textual evidence that the Constitution exempts the President from all liability in cases like this. While Congressmen enjoy the privileges of the Speech or Debate Clause of Article 1,

> [t]he Constitution makes no mention of special Presidential immunities. Indeed, the executive branch generally is afforded none. This silence cannot be ascribed to oversight.

Halperin v. *Kissinger*, 606 F.2d 1192, 1211 (D.C. Cir. 1979); *Nixon* v. *Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (en banc).

The Constitution does specify, however, that an impeached President may still be tried in the courts for any offense. U.S. Const., Art. 1 § 3, cl. 7.

> By contemplating the possibility of post impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens.

Nixon, *supra*, at 711. The deliberations of the Framers of the Constitution are silent on the specific question of whether the President was to be immune from suits for money damages arising out of conduct while in office.[28] What is clear from the debates, the contemporaneous writings of the Framers, and the Constitution itself, is that the President was to be subject to the law rather than above it, in contrast to the King of England. U.S. Const. Art. I, § 3; Art. II, § 3, § 4; II J. Elliott, *supra*,

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[28] There is some evidence that the Constitutional Convention was presented with the question of Executive privileges and chose not to grant any. *See* 3 M. Farrand, *The Records of the Federal Convention of 1787* (1937) 385, 605-06; 2 M. Farrand, *supra*, at 903; Halperin v. Kissinger, 606 F.2d 1192, 1211, n.129 (D.C. Cir. 1979).

480 (1836); IV Elliott *supra*, at 114). *See The Federalist*, No. 69, No. 77 (A. Hamilton).

Otherwise, the Constitutional scheme betrays no indication that any kind of immunity was intended for the President or the executive branch. On the contrary, the doctrine of separation of powers provides a Constitutional imperative for denying Petitioners the autonomy they seek. In one key case, a three judge court has succinctly described a useful approach to separation of powers questions which illuminates the issues presented by this case:

> [S]eparation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch.

Nixon v. *Administrator of General Services*, 408 F. Supp. 321, 342 (D.D.C. 1976) (three-judge court), *aff'd*, 433 U.S. 425 (1977).

Under this framework the result is clear. The impact on Congress of absolute immunity would be devastating. Absolute immunity would enable the executive branch to undermine Congress' legislative and informing functions. If the President and his advisors are harmed at all by application of the doctrine of qualified immunity, that harm is far outweighed by the benefits to Congress.

Finally, absolute immunity should not be adopted on the mistaken ground that it would prevent improper judicial intrusion into executive matters. "Clearly, a proper regard for separation of powers does not require that the courts meekly avert their eyes from Presidential excesses while invoking a sterile view of three branches of government entirely insulated from each other." *Hal-*

perin v. *Kissinger*, 606 F.2d at 1212, *citing Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 635. This case presents the court with a classic conflict between Congress and the Executive. The Court has been an arbiter of such interbranch disputes, and an interpreter of the Constitution. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

CONCLUSION

For the reasons stated above, the proper result is for this Court to deny the Petitioners absolute immunity in this case. Petitioners should be subject to personal liability for damages arising from their unconstitutional and illegal conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion For Leave To File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Senator Orrin G. Hatch and Representatives John D. Dingell, Robert K. Dornan, Barney Frank, Albert Gore, Jr., A. Toby Moffett, and Patricia Schroeder, Members of Congress in support of RESPONDENT, has been served this 30th day of October, 1981, in the manner indicated:

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Nos. 79-1738 and 80-945

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,
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v.
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Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

and

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Motion for Leave to File Amicus Curiae Brief on Behalf of Mountain States Legal Foundation as Amicus Curiae in Support of Respondent

Mountain States Legal Foundation respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation (the Foundation), is a nonprofit, public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom.

2. One of the guiding principles of the Foundation is the need for responsive and responsible government at all levels. To this end, the Foundation has filed suits seeking personal liability of government officials. *Mountain States Legal Foundation v. Andrus,* No. 79-275K (D. Wyo., filed Sept. 20, 1979); *Mountain States Legal Foundation v. Denver School District No. 1,* 459 F. Supp. 357 (D. Colo. 1978); *Campbell v. Arapahoe School District No. 6,* No. 76-M-1069 (D. Colo., May 19, 1981). The Foundation therefore has a significant expertise and interest in the immunity issue found in the instant case.

3. The issue of presidential immunity from personal liability suits is one which affects all citizens interested in a government accountable to the law. The Foundation intends to present to the Court the overriding interests, transcending those of the parties, which compel protecting the President with qualified, rather than absolute, immunity.

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that its motion for leave to file the annexed *amicus curiae* brief, be granted.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The Mountain States Legal Foundation (the Foundation) is a nonprofit, public interest legal center dedicated to addressing in the courts those issues which affect individual liberty and economic freedom. The instant case has great significance and potential for impact on the individual liberty and constitutional rights of all Americans. The Foundation has long pursued a policy of making government at all levels more responsive and responsible by imposing personal liability on those officials who knowingly violate established rights. *Mountain States Legal Foundation v. Andrus,* No. 79-275K (D. Wyo., filed Sept. 20, 1979); *Mountain States Legal Foundation v. Denver School District No. 1,* 459 F. Supp. 357 (D. Colo. 1978); *Campbell v. Arapahoe School District No. 6,* No. 76-M-1069 (D. Colo., May 19, 1981). The issue of presidential immunity is a direct and logical extension of such fundamental Foundation activity.

SUMMARY OF ARGUMENT

In deciding the nature of immunity from personal liability to be accorded the President of the United States, the Court is faced with the culmination of a trend which gained momentum during the last decade. The trend is one which recognized the overriding need to provide a mechanism for redress of individual injury resulting from constitutional violations by federal executive officers. The public policy justifications for establishing personal liability through an implied cause of action for violation of constitutional rights were compelling. The Court now has the opportunity to decide whether the President of the United States occupies a unique position which for constitutional and countervailing policy reasons justifies according the occupant of the Oval Office absolute immunity from personal liability.

It is the position of this *amicus* that, while the President does indeed play a unique role in our governmental structure, such a role does not mandate absolute immunity. Rather, it is entirely proper under the Constitution and relevant public policy considerations to protect the President through a grant of qualified immunity. The key to fair and effective application of such qualified immunity lies in (1) express recognition by this Court of the unique and vital nature of the presidency; and (2) the articulation of a clear procedure and standard of review whereby insubstantial or frivolous lawsuits may be dismissed at the earliest possible stage of the litigation.

This brief will first address the development of the theory of qualified immunity with a focus on the policy considerations. Thereafter, an examination will be made of the special factors which might, but should not, cause this Court to hesitate in subjecting the President to carefully construed personal liability. Finally, a standard of review will be proposed which affords aggrieved parties an opportunity to recover for violation of established constitutional rights, but also recognizes the importance of protecting the President's ability to act decisively and with due confidential deliberation as leader of our nation.

ARGUMENT

I. THE RATIONALE UNDERLYING THE THEORY OF QUALIFIED EXECUTIVE IMMUNITY MANDATES REJECTION OF ABSOLUTE IMMUNITY FOR THE PRESIDENT.

Prior to 1971, federal executive officials were absolutely immune from suits seeking damages arising from acts within the outer perimeter of the officials' authority. *Barr v. Matteo,* 360 U.S. 564 (1959); *Spalding v. Vilas,* 161 U.S. 483 (1896). This executive immunity was judi-

cially created by analogy to those cases which established immunity for judges. *See Barr*, 360 U.S. at 578 (Warren, C.J., dissenting). Its principal justification was articulated by Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949). Judge Hand recognized that anything less than absolute immunity would subject even conscientious officials to suits in which:

> it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

177 F.2d at 581.

In addition to absolute personal immunity, sovereign immunity precluding most claims against the United States further restricted the ability of victims to obtain compensation for damages suffered at the hands of government officials. Thus, in a country of constitutionally limited government, citizens were placed in the curious position of being unable in many cases to vindicate or effectively redress violation of their rights. While the Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1976), provided some relief, insurmountable hurdles remained which frustrated any effort to obtain damages from responsible officials.

In order to remedy this injustice and to deter officials from violating constitutional rights, courts expanded those instances in which officials could be held personally liable for constitutional violations. Personal liability actions were held applicable to federal officials for the first time during the 1970's. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The courts gradually arrived at one theory of immunity for both

federal and state executive officers in such suits, *i.e.* qualified immunity in which the official would be liable if he knew or reasonably should have known that the action taken would violate established constitutional rights or if he acted maliciously to cause constitutional violations. *Butz v. Economou*, 438 U.S. 478 (1978). The stimulus for formulation of one consistent theory was the incongruity of using the United States Constitution to protect citizens from acts by state officials, but not from those by federal officers. *Butz*, 438 U.S. at 504. A similar incongruity would exist if the President is cloaked with absolute immunity while the rest of the executive branch face potential personal liability. The instant case provides the Court with the opportunity to address and prevent this incongruity.

The manner in which the Court reconciled the law and public policy in creating qualified immunity for state and federal officials is relevant to the process it must now undertake in determining the nature of presidential immunity. Beginning with *Bivens*, the Court wrestled with the problem of protecting the constitutional rights of American citizens from violation by federal officials while at the same time preventing paralysis of government through harassing suits. The balance which the Court began to strike was premised upon the explicit recognition that citizens must have some effective means for redress of constitutional violations through common law suits. The power of the Court to provide such redress was based upon the now famous quote from *Bell v. Hood*, 327 U.S. 678, 684 (1946): "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (*cited with approval in Bivens*, 403 U.S. at 392.)

In the years following announcement of its decision in *Bivens*, the Court attempted to refine the theory of im-

munity in implied constitutional cases against state officials. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975). Once qualified immunity was recognized as a valid means of protecting officials while enabling citizens to vindicate their rights, *Scheuer*, 416 U.S. at 247-48, the Court determined that such qualified immunity should be pierced when constitutional rights are violated by an executive official who:

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights [of the plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . .

Wood, 420 U.S. at 322.

In *Butz*, the Court established a qualified immunity based on the *Wood v. Strickland* standard for application to federal officials in implied constitutional causes of action. The Court in *Butz* reasoned that express statutory or constitutional limitations on the action of federal officials defined the outer limits of proper activity. *Butz*, 438 U.S. at 489. It recognized that there was no justification, legal or otherwise, which could support permitting federal officials to knowingly violate established rights with impunity. The *Butz* Court quoted with strong approval the premise eloquently set forth in *United States v. Lee*, 106 U.S. 196 (1882), that:

> [n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

106 U.S. at 220. Indeed, the propriety of this Court recognizing qualified immunity for the President is underscored

by Chief Justice Marshall who wrote: "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The power and resources as well as the obligations and duties of the President are awesome, but he is still bound by the limts of the Constitution. In light of this, the rationale behind the foregoing cases should support application of carefully delineated qualified immunity to the President, absent "special factors counselling hesitation," *Bivens*, 403 U.S. at 396, since "the greater power of such [an official] affords a greater potential for a regime of lawless conduct." *Butz*, 438 U.S. at 506.

II. THERE ARE NO SPECIAL FACTORS WHICH MANDATE ABSOLUTE IMMUNITY FOR THE PRESIDENT.

A. *Qualified Presidential Immunity Does Not Violate The Separation Of Powers Doctrine.*

The framers of the Constitution sought to frustrate tyranny by dividing the powers of government among three branches of government, the legislative, the executive and the judicial. Article I, section 1 of the Constitution provides that:

> All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Article II, section 1 of the Constitution provides that:

> The executive Power shall be vested in a President of the United States of America.

Article III, section 1 of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The framers did not include in the Constitution an express separation of powers clause prohibiting one branch from exercising the powers of another. The courts have therefore applied the separation of powers doctrine by developing their own doctrines to define the precise relationship among the branches. *E.g., Springer v. Philippine Islands,* 277 U.S. 189 (1928).

It has been contended that to accord the President anything less than absolute immunity would violate the separation of powers doctrine. *E.g.,* Note, *Presidential Immunity from Constitutional Damage Liability,* 60 B.U.L. Rev. 879 (1980); *see Carlson v. Green,* 446 U.S. 14 (1980). An examination of the pertinent case law, however, reveals that under properly delineated circumstances a qualified immunity is completely compatible with the separation of powers doctrine.

This Court is now faced with an apparent conflict between the executive and judicial branches. In reconciling this apparent conflict it should be remembered that the separation of powers doctrine is not precisely defined or consistently applied. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson J., concurring); *Hampton & Co. v. United States,* 276 U.S. 394 (1928); J. Story, *Commentaries on the Constitution* § 525 (5th ed. M. Bigelow 1905). The branches of government have never operated with rigid independence from each other. Rather, a dynamic balance must be struck in each instance which permits government effectiveness while maintaining the institutional integrity of each branch.

The role of the judiciary was clearly established in *Marbury v. Madison,* which held that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) at 177. Under such a mandate the courts have repeatedly established standards of review and determined when either Congress or the President have exceeded constitutional bounds. *E.g., Powell v. McCormack,* 395 U.S. 486 (1969); *Youngstown.* In all such cases it is recognized that a delicate analysis must be made in which the Court does not unduly intrude into the fundamental functions committed to each branch. *Baker v. Carr,* 369 U.S. 186 (1962).

To determine if subjecting the President to personal liability violates the separation of powers doctrine, the Court must engage in the balancing process set forth in *Nixon v. Administrator of GSA,* 433 U.S. 425 (1977):

> In determining whether [an act or policy] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [acted upon branch] from accomplishing its constitutionally assigned functions . . . . Only where the potential for disruption is present must [the Court] then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of [the acting branch].

433 U.S. at 443.

It is necessary to examine whether Court-created qualified immunity for executive officials, including the President, furthers the constitutional function of the Court. Under the Constitution it is the function of the Court to decide "all cases, in Law and Equity, arising under this Constitution." U.S. Const. art. III, § 2, cl. 1. This has been interpreted to vest the Court with the vital function

of guarding constitutional liberties from infringement by the legistlative or executive branches. *Bivens,* 403 U.S. at 392. The recent case of *Davis v. Passman,* 442 U.S. 228 (1979), recognized this, and cited with approval James Madison's statement made upon presentation of the Bill of Rights:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

442 U.S. at 241-42.

Since the President is the chief of the executive branch, the constitutional function of the judiciary is furthered by preventing unconstitutional acts by the President. Application of qualified, rather than absolute, immunity is entirely consistent with the traditional role of the Court as guardian of the Constitution.

Next, it is necessary to determine if the constitutional functions of the President would be impeded by potential personal liability. The functions of the President are varied under Article II, section 1 of the Constitution. While he should be immune for certain acts [*See* § III, *infra*], no automatic interference with his functions would occur by imposition of clearly delineated qualified immunity. An examination of the traditional justifications for absolute immunity reveals that absolute immunity for most presidential acts is unnecessary. Under the traditional rationale, there were two reasons for absolute immunity: (1) that the potential for personal liability would paralyze effective government and; (2) that it would dissuade even the most

resolute from undertaking government service. *Barr; Gregoire.* These justifications for absolute immunity have been consistently rejected by recent cases which recognized that the vindication of constitutional rights was of paramount significance, and that the potentially negative effects of qualified immunity were outweighed by the sanctity of liberty in our society. *Bivens; Butz.* Indeed, while the number of personal liability suits has risen since *Butz, Halperin v. Kissinger,* 606 F.2d 1192, 1214 (1979) (Gesell, J., concurring), the predicted adverse impact has yet to materialize.

Use of the foregoing concerns to justify absolute immunity for the President also elevates form over substance. Absolute immunity of cabinet members, *Butz,* and advisors, *Halperin,* has already been eroded to a qualified immunity based on the *Wood v. Strickland* standard. The concern of possibly rendering the President indecisive or unable to obtain frank advice from subordinates and advisors thus does not mandate absolute immunity. Any chilling effect on confidential communication is already in existence, and would be arguably greater if subordinates knew that they alone stood to suffer for advocating or carrying out questionable activities. Additionally, the need for confidentiality of presidential communications is respected by the Court. *United States v. Nixon,* 418 U.S. 683, 706 (1974). This respect can be given further substance through properly defined standards for summary judgment. [*See,* § III, *infra*]. Furthermore, to argue that qualified people will spurn the chance to lead the most powerful nation on earth because of personal financial accountability for unconstitutional acts ignores political and social reality.

It is, of course, necessary to recognize the unique status of the President [*See* § III, *infra*], and the fact that what holds true for underlings may not apply with equal validity to the Chief Executive. It may be argued that, of all federal officers, the President must be unfettered in his ability to

execute his duties. To the extent that his ability to perform is impaired by the potential for personal liability, some interference with his constitutional powers occurs. This *amicus* believes that such interference would in practice be minimal.

B. *Public Policy Is Furthered By Qualified Presidential Immunity.*

A clear benefit derived from qualified immunity is that improper conduct is deterred. *Carlson*. This is a benefit which cannot be precisely quantified since it has no historic track record at the presidential level. While the United States has survived admirably for 200 years with apparent absolute presidential immunity, in this age of increasing social complexity and potential for technologically assisted abuse of rights, a new dimension is added to the balancing exercise. Deterrence from unconstitutional conduct becomes ever more crucial.

Another general public policy supporting presidential liability is compensation of the victim. Compensation for injury could conceivably come from officials acting in concert with the President if the President were absolutely immune. However, the injustice of allowing the primary transgressor to go unpunished in some cases, and the potential for reluctance by jurors to fully assess damages against only subordinate officials mitigate against such a restrictive method of compensation.

To charge the President with the responsibility to act within established constitutional limits can in reality preclude or inhibit valid activity only in very rare cases. He may readily avail himself of experienced legal advice and is, "like any other citizen . . . charged with knowledge of established law and must be held accountable for personal misconduct." *Halperin v. Kissinger*, 424 F. Supp. 838, 845 (D.D.C. 1976).

In the vast majority of instances, the President would indeed know what acts were constitutionally permissible and could find an efficacious constitutional option. It begs credibility to assert that he must be free to exercise unconstitutional powers with impunity. The integrity of the governmental structure and the stability of the country must take paramount importance over a theoretical need for maximizing the options available to the President.

In order that the citizens of this country have full constitutional protection, it is necessary for the President to be subject to personal liability for those acts which he knew or reasonably should have known would violate established constitutional rights or where he acted with malicious intent to cause violation of such rights. It is in precisely those instances when a President may deem unconstitutional action more effective or desirable that he must be deterred by potential personal liability. The proper safeguards for the President should come from careful judicial scrutiny that recognizes the unique nature of the presidency and places a commensurate burden on every plaintiff at an early stage of any litigation to meet high threshold requirements or face dismissal.

III. THE PRESIDENT WOULD BE ADEQUATELY PROTECTED BY QUALIFIED IMMUNITY.

In deciding the extent of personal liability to which the President may be subjected, it is initially necessary to carefully carve out those instances in which his actions have *absolute immunity*. First, those actions which have overriding national security justification deserve protection. In this respect, decisions made by the President in his capacity as commander-in-chief, particularly during a state of declared war, are of a nature deserving judicial deference for both constitutional and public policy reasons. Other ac-

tions in the realm of foreign policy taken in time of peace might also deserve protection, if it is clear that there is indeed a direct link to legitimate foreign policy which is solely within the province of the President. Another instance where absolute immunity may well be appropriate is that in which the President is faced with a true emergency situation requiring decisive action, *e.g.*, reaction to terrorist extortion. *Halperin*, 606 F.2d at 1212. Finally, the President would also be immune from liability for such clearly executive acts as signing a bill into law. It would be the duty of the judiciary to insure that these exceptions were not abused or given overly broad definition.

Acts not falling within one of the foregoing categories would receive protection to the extent they met the standards of qualified immunity outlined in *Butz*. The unique nature of the presidency could be accommodated by strict application of the "sliding scale" recognized in *Scheuer*, 416 U.S. at 247. This application would recognize that the President heads a government of unprecedented size and complexity. Accordingly, in any such case the Court must recognize that the President cannot be automatically charged with intricate knowledge of the facts supporting every decision he makes or all ramifications of his decisions. Nor would he be under obligation to consult sources other than those normally relied upon in the ordinary course of business. The complexity and pressure of presidential duties would weigh heavily in any balancing to determine what he knew or reasonably should have known.

Discovery would properly involve lower echelon officials at the early stages of litigation. Obviously, presidential business should not be interrupted for routine depositions or other discovery. Absent compelling reasons to the contrary, motions for protective orders could be granted if it were established that the desired discovery would either unduly disrupt the President's performance of his duties,

compromise national security, or violate confidential communications within the executive branch. Should the need arise, an *in camera* examination by the judge would be appropriate. *Nixon*, 418 U.S. at 714.

The President would be able to move for dismissal or summary judgment at any time after service of the complaint. Fed. R. Civ. P. 12 & 56. If the motion was premature, the court could either deny or stay the motion pending necessary discovery. Once the motion became ripe, however, the burden of proof should rest with the plaintiff to establish, "through clear and convincing evidence that [the President] failed to act with subjective or objective good faith." *Halperin*, 606 F.2d at 1215 (Gesell, J., concurring); *see generally United States v. Bridges*, 133 F. Supp. 638 (1955); IX Wigmore on Evidence § 2498 (3d ed. 1940). In determining whether the plaintiff has met this burden the Court must be especially vigilant in examining claims of subjective (i.e., malicious) bad faith. Should the plaintiff fail to meet the aforesaid burden, full assessment of costs after dismissal would be appropriate.

The procedure outlined above would require each court to exercise firm control over any case involving potential liability of the President. However, such a burden on the courts is not different in degree from that found in any truly complex litigation.

CONCLUSION

In light of the overriding importance of protecting the Constitution from knowing abuse, the courts must be clearly charged with a dual duty. Of primary importance is the duty to vindicate constitutional rights by imposing personal liability on any federal executive, including the President, who fails to meet the standards of qualified immunity as previously discussed. Grave, but secondary, im-

portance lies in protecting the President from meritless, vindictive, or insubstantial lawsuits.

The President is adequately protected by qualified immunity. Subjecting the President to personal liability in appropriate instances fulfills compelling public policy, does not violate the separation of powers doctrine, and is a valid function of the judiciary.

Respectfully submitted,

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Nos. 79-1738 and 80-945

IN THE

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Respondent.

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ALEXANDER P. BUTTERFIELD,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL TAXPAYERS LEGAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

and

BRIEF OF THE NATIONAL TAXPAYERS LEGAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The National Taxpayers Legal Fund, Inc., respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support whereof, it states:

1. The National Taxpayers Legal Fund, Inc., (Taxpayers Fund[1]) is a 501(c)(3) charity. It was established in 1973 to advance the interests of taxpayers in the conduct, according to

[1] (This footnote omitted.)

law and due process, of the federal taxing and appropriations mechanisms. To that end, it has provided testimony on legislation and regulations, pursuant to IRS regulations, from its Chairman, former Senator Eugene J. McCarthy, and has intervened in selected cases of general importance.[2]

2. Specifically concerning the appropriations processes, Taxpayers Fund is interested in the effectiveness of Congressional oversight of the spending of government funds. It has expertise and interest in the effect of this decision on the ability of Congress to obtain accurate and complete information necessary to carry out the appropriations process.

3. Whether a President should have absolute or qualified immunity in cases such as this one will have permanent and major impact on the relationship between the President and the Congress, and on the ability of each to carry out their duties under the Constitution. Taxpayers Fund will address primarily the effect on Congress and will not duplicate briefs heretofore filed.

4. Counsel for Taxpayers Fund has obtained consent for the filing of this brief from counsel for Respondent, and from counsel for Petitioners Harlow and Butterfield. Counsel for Petitioner Nixon stated that he neither consents to, nor opposes, the filing of this brief. Therefore, this Motion is necessary.

For the foregoing reasons, The National Taxpayers Legal Fund, Inc., respectfully submits that its Motion for Leave to File the Annexed *Amicus Curiae* Brief, should be granted.

Respectfully submitted,

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[2] For the record, Taxpayers Fund notes that Ernest Fitzgerald is one of its six Board Members, but he removed himself from any consideration of the decision to file this brief.

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INTEREST OF AMICUS

The National Taxpayers Legal Fund, Inc. (Taxpayers Fund) is a 501(c)(3) charity, established as a non-profit organization. Taxpayers Fund is supported entirely by public donations, and is dedicated to the legal advocacy of the interests of taxpayers in both the taxing and appropriations processes. It becomes involved only in those cases which have substantial general impact, and views the instant case in that light.

Specifically, it believes that the present case will have major, long-term impact on the relationship between the Presidency and the Congress, and especially on the ability of Congress to obtain full and accurate information in conducting its oversight of the use of appropriations. This, in turn, has an indirect effect on all taxpayers.

It views the question of whether the President should have absolute or qualified immunity in this civil case as critical to that future capacity of Congress.

SUMMARY OF ARGUMENT

Taxpayers Fund submits that a President should have qualified immunity from a civil suit such as this one, under the standards laid down in the *Butz* case, recognizing the difference in application that occurs when a President, rather than a Cabinet-level official, is involved. It acknowledges that such a conclusion may cause certain practical difficulties which would apply to future cases, but do not apply to this one. If such difficulties arise, they can be prevented by appropriate legislative or judicial controls. And Taxpayers Fund submits that this conclusion is compelled not just by considerations of the powers and duties of the Presidency, but also by the powers and duties of the Congress, which are necessarily involved in this case, and which will be involved in future ones.

The Constitution gives express powers to Congress to raise funds through taxation, and to spend them through appropriations. Unless Congress has accurate knowledge of the ways that the billions of dollars it has authorized, are being spent, its Constitutional power of appropriations is rendered ineffective. For that reason, a President cannot interfere deliberately and knowingly with a witness before Congress. Accordingly, the Petitioners here cannot have absolute immunity from the Respondent in a civil case. The proper conduct of public business requires this result.

Other procedural and factual issues are raised in the case, but are fully addressed by the parties and by other briefs, and will not be discussed by Taxpayers Fund. Among the other

issues, the *amicus* will address only the question of whether the Civil Service remedies constitute full redress, to the extent that the issue bears on Congressional ability to oversee appropriations.

ARGUMENT

I. THE DECISION BETWEEN ABSOLUTE AND QUALIFIED IMMUNITY IN THIS CASE WILL AFFECT FUTURE PRESIDENTS AND FUTURE CONGRESSES, ESPECIALLY THE DUTY OF CONGRESS TO INITIATE AND APPROVE APPROPRIATIONS, AND TO OVERSEE THE SPENDING OF FUNDS ONCE APPROPRIATED. FOR THAT REASON, AMONG OTHERS, THE PRESIDENT SHOULD BE AFFORDED QUALIFIED IMMUNITY.

The Petitioners have presented this case to the Court as if it concerned only the civil liability of them to the Respondent, a "middle-ranked Defense Department official" who was dissatisfied with his termination. Taxpayers Fund submits that much more is involved, that the case affects the Constitutional balance of powers.

From Plato's *The Republic,* through Machiavelli's *The Prince,* the basic theory of government was that the leader of any nation had legitimate authority to do what he chose, using his sole determination of what was best for the citizens of that nation. To Machiavelli, and those who share his viewpoint today, governance is a matter only of the pragmatic use of this power. But to another group of philosophers, ideological descendants of the Greeks and Romans, and including the Framers of our Constitution, there was a deeper question. It was stated by the Roman poet, thusly: "*Quis custodiet ipsos custodes?*" *(Juvenal, VI,* p. 347.)

Even under the theories of democracy as they existed prior to 1787, it was possible for the legislative body to cede all power to the leader of a nation, and then for that leader to function with no effective limits on his power other than the

pragmatic ones of which Machiavelli wrote. This is not possible under a Constitutional government such as ours. The definition of the government by its Constitution is more basic than any specific actions of its office-holders in any branch of the government, including the President. *Youngstown Sheet and Tube* v. *Sawyer,* 343 US 579 (1952). Although the Framers intended that our office-holders be the first guardians of our freedom, the Constitution itself is the guardian of the guardians.

A. This Case Concerns More than the Weighing of The Rights of an Individual Against a President Who May Have Harmed Him. Of Necessity, it Involves the Balance of Powers Between Any President and Any Congress.

This specific case concerns the revelation and testimony under oath before Congress by the Respondent of a $2 billion overrun in the cost of the C-5A airplane, and his subsequent firing by the Respondent(s). It is the possibility of the repetition of such events in the future, and the effect of the decision in this case on the President and the Congress at such future times, that is the concern of Taxpayers Fund in the present case.

The Petitioners in their briefs make passing reference to the system of checks and balances as established in our Constitution, but discuss them in detail only as they concern the powers of the President, and as if a decision in this case against them would cause the courts to interfere improperly in the functioning of the Executive Department. Taxpayers Fund submits that this is the correct fundamental question, but the wrong aspect of it. No reference is made to the specific powers of Congress. And those are the key to the decision in this case, and its future import.

After naming, describing and specifying the organization of the Senate and the House of Representatives, the very first specific legislative power that is mentioned and provided in the Constitution reads as follows: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

(Art. I, § 7, ¶ 1.) In the *Federalist,* the Founding Fathers explained that the power to tax was vested initially in the House because that body by its larger numbers and its direct and more frequent elections was closer to direct control by the people than any other official or organ of government. (*Federalist,* # 35.)

Once funds had been raised by taxes duly imposed, they could be spent for any purpose within the reach of the powers of Congress. (See Art. I, § 8, generally.) This could be done only by means of appropriations, passed by Congress and signed by the President. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law. . . ." (Art. I, § 9, ¶ 7.)

As explained in the *Federalist,* this provision was designed to give control to Congress generally as the direct representatives of the people (the House) and of the States (the Senate) over the spending of the funds of the federal government. There was one exception stated, the veto power of the President, and one exception implied, the review of Constitutionality of legislation by this Court. (See *Federalist,* # 47.)

While the election of Senators has since become a matter of popular vote rather than selection by the legislatures of the several States (Amendment 17), the basic pattern of the raising and spending of funds as established by the Constitution remains unchanged.

B. It is Not Just Logic, but Actual Experience of The Executive Department, as Found by That Department, Which Makes this a Case of Substantial, Long-Term Importance.

Taxpayers Fund now fits the instant case into that framework. Respondent was an employee of, and a member of, the Executive Department of the government. The terms of his employment there, however, were governed by laws enacted by Congress. (The question of available Civil Service remedies, their use, and their effect *vel non* on this case are discussed below.) It should be noted that the definition of the terms of

employment of all Executive Branch employees rests with Congress, with one single exception: Congress may not reduce the salary of the President while he is in office. (Art. II, § 1, ¶ 7.)

It is a matter of courtesy, not Constitutional requirements, that historically the President has been allowed to determine the composition and salaries of the White House staff, and Congress has been allowed to determine the composition and salaries of its various supporting staffs, without opposition from the other. As to the balance of the Executive Department, now consisting of almost 3 million civilian employees, their numbers, powers, duties and compensation have often been hotly contested between the President and the Congress.

Under the Constitutional scheme, all employees of the Executive Department bear a master-servant relationship to the President, though with the coming of Civil Service, which began under President Chester Arthur, they do not serve at the will of the President. The only exception to this pattern is the General Accounting Office, which is employed by, and reports only to the Congress. (31 U.S.C. § 41.)

However, for Congress to exercise its powers to raise funds through taxes, and to spend them through appropriations, it must have accurate information on how the Executive Department is functioning in both areas. Its source of such information is to have various members of the Executive Department testify before the various Committees and Subcommittees of Congress. The power of these Committees to subpoena all such employees (with the possible exception of the President only) to testify on all relevant matters has been established and recognized as concomitant to the power to legislate, from the beginnings of the Republic. (See 2 U.S.C. § 190-194.)

Taxpayers Fund emphasizes the essential nature of the information-gathering process to the ability of Congress to carry out its Constitutional duties. If Congress cannot obtain full and accurate information from Executive Department employees who testify before it, then it is put in the position of the Board of Directors of a corporation, having almost 3 million

employees, who can only obtain reliable information on the operations of the business by contacting the outside accountants, which is roughly the position of the GAO. In short, such an inhibition of information from the normal sources prevents Congress to that extent from carrying out its Constitutional duties.

As the case of the Respondent demonstrates, this pattern of being employees of the Executive Department, but being called upon to testify to Congress, creates a conflict of interest. The most succinct description of that conflict is, "No man can serve two masters." (*Matthew 6:24.*) It can be expected that in the future, as in the instant case, there will be times when the Executive Department may not want certain information to reach the Congress. On the other hand, Congress may summon and require the testimony of the person who has that information. What, then, is the duty of that individual?

The obligation of the individual is to testify honestly. The obligation of all others is to refrain from interfering with that testimony. Such interference is a crime, punishable by five years in prison and/or a $5,000 fine for any person to interfere, or seek to interfere with the testimony of any individual before any Committee or Subcommittee of Congress. (18 U.S.C. § 1505.) No exceptions are stated in the law for the person who is testifying, nor for the person who so interferes.

Respondent testified several times before Congress, including on the $2 billion overrun of the C-5A. His testimony was protected. If the subsequent facts are as he alleges, then the actions of the Petitioners were illegal.

But this case is civil, not criminal, and Taxpayers Fund submits that the basic question is the effect that the present outcome will have on the willingness of Executive Department employees in the future to testify fully and accurately to Congress concerning the operations of their various Departments and Agencies.

While the legal theory is that all such witnesses will testify fully and honestly, the theory may fail in practice. The transcripts in this case suggest that Respondent was terminated

for not being a "team player." This suggests that the favored behavior of a civil servant is to raise his concerns through channels, within the family. It also suggests that it is a greater evil to make public a difference of opinion, even when commanded by Congress to do so, than it is to go through channels.

As a practical matter, silence of government employees who know of abuses of power, and misuses of government money, is unfortunately widespread. This has been recently confirmed by the Executive Department itself, in a study performed by the Merit Systems Protection Board, early this year.

The results of this survey are reported in, "Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismanagement?" by the Merit Systems Protection Board, April, 1981, copies of which are lodged with the Clerk of Court. The methodology was to send 13,000 questionnaires to randomly-selected federal employees at their home addresses. The number chosen from each Agency was in proportion to that Agency's relative size among government civil servants.

The first important result was the extremely high response. 8,600 survey forms were returned, which is much higher than the expected response rate from any type of mail survey. Also, the survey was extensive and detailed. The questionnaire is printed in the report. The very high response to a very detailed survey, suggests that the results obtained are reliable.

The key substantive findings were these: 45% of the respondents reported personal observations of "waste, fraud and mismanagement" in government during the past year. One in ten of those said the activity seen involved more than $100,000. Less than one in five of those reported what they had seen to any "responsible official or channel."

The three leading reasons given why the observers did not report what they had seen were: "Nothing would be done"—53%; "Nothing could be done"—20%; and "It was too great a risk for me"—19%. When asked what incentives would encourage observers to report what they had seen, the four leading answers were: "Knowing that something would be

done"—81%; "Knowing I would be protected against reprisals"—41%; "Knowing that the problem was serious"—36%; and "Knowing I could report it anonymously"—28%. The survey also breaks down the level and kinds of reprisals which have been taken during the past year, and the lack of confidence of employees that they will be protected if they make true but adverse reports about the operations of their offices. It also shows that the possibility of reports being made declines sharply beyond the level of the employee's immediate supervisor.

Respondent was not covered in his civilian job with the military by the Merit System Protection Board. So, this report does not concern him directly; however, the Taxpayers Fund submits that it clearly shows the extent of the problems of the misuse of government funds, of the failure to report it, and of the fear of reprisals, each of which will be directly affected for better or worse by the outcome of this case.

It was partly in response to the firing of the Respondent that Congress passed the Civil Service Reform Act of 1978 (5 U.S.C. § 2301, *et seq.*), known popularly as the Whistleblowers Act. As its provisions show, its purpose was to insulate government employees from retaliation for providing honest information on malfunctions of the government. Numerous hearings have been held subsequently on the effectiveness of the Act, one being before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service of the House of Representatives, March 4, 5, 6, and 12, 1980. Copies of the transcript of that have been lodged with the Clerk of Court.

To set the general framework of reports by government employees, and reprisals for such reports, Taxpayers Fund would draw the Court's attention to the Statement of the Government Accountability Project of the Institute for Policy Studies (at p. 53), the Statement of Senator Ribicoff, Chairman, Governmental Affairs Committee (at p. 181), and the Statement of the President-Elect of American Society for Public Administration. (p. 72).

These statements, and others throughout the testimony, all stress that the ability of the government to control and direct its spending, and therefore its accountability to the public for its choices and actions, are hampered to the degree that the elected leaders of the government, both the President and the Congress, cannot obtain full and accurate information about what the government is doing with its funds.

The "oversight responsibilities of Congress," to which Senator Ribicoff refers, are a shorthand for the appropriations duties of Congress, as set forth in the Constitution. Taxpayers Fund submits that these are the key to the instant case.

C. The Statutory Remedies Available to the Individual Are Not Complete, Even for Him. Even if They Were, They Offer No Effective Remedy for the Presidential and Congressional Interests Directly Involved, and the Public Interest Involved Indirectly.

The record reflects that the Respondent has been restored to his pay scale, and has received back pay, for being improperly terminated. Petitioners argue that this is full relief, and that none other should be allowed by the Court.

The first answer is that this is not full relief. In *Fitzgerald* v. *Hampton* (US DC, for DC, No. 76-1486, 3 March, 1981), the Court ruled that the Air Force had substantially diminished the duties and responsibilities of Respondent, and that the Civil Service Commission had not granted appropriate relief, despite instructions on prior remand.

The reasoning is straight forward. To high-level federal employees, the responsibilities and discretion they exercise in their positions are a major part of why they seek and hold such a position. Retaining a title, a salary, and an office, but losing those, is not a full remedy. For example, were it possible for a judge to be terminated wrongfully, and then reinstated, with all the prerogatives of his office except the opportunity to decide cases, it would be a fatally incomplete remedy.

But even if it was possible to fashion a complete reinstatement for a high-level civil servant, that would not be a total

remedy for him. There are harms to the individual, both personal and financial, which are not met. Still, the importance of this case goes far beyond the individual.

If this is the only remedy, absolutely nothing is done with respect to the individual(s) who caused the employee to be fired in the first instance. It is the taxpayers, not the superior officers, who provide the back pay. The superior officer is in a no-lose position, when contemplating a dismissal which he may know to be improper. If the termination is not reversed, the superior has gained his objective. If the termination is subsequently reversed, the superior has still gained his objective partially for the years that the employee was out of work, and the superior bears no part of the costs of reinstatement.

So the Court must address the choice between qualified or absolute immunity for a President both for the instant case, and for the inevitable future cases. In deciding the present case, however, the Court should consider the effect of its decision on the Constitutional powers of the Congress. The most recent case with precedential[3] value, bearing on the present case, is *Butz* v. *Economou,* 438 US 478 (1978). The majority in *Butz* found that a Cabinet-level official is entitled to only qualified immunity, and stated the standard as "good faith and reasonable grounds." (*Butz* at page 485.) It restated the "general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." (*Butz,* at page 490.) It rejected in a single paragraph the claim of absolute immunity for the federal officials sued in the case.

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[3] The case of *Halperin* v. *Kissinger,* 606 F. 2d 1192 (D.C. Cir., 1979), *aff'd by equally divided Court,* No. 79-880, 22 June 1981, offers no precedent because of the equal vote. It is also distinguishable from the instant case on two grounds. National security was a major issue in *Halperin,* and is not present here. The interests of Congress are at issue here, and were not present in *Halperin.*

However, there was a strong and outspoken dissent in *Butz*. The dissent recognized as a practical matter that substantial sums are at stake in government decision-making, and that the higher the level of the official, the broader the decision, and the greater the sums involved. It recognized that both businesses and individuals having large financial interests in the outcomes of such decisions might be tempted to file suits against the federal officials involved, on the basis that sometimes the only defense is a good offense. The dissent also recognized the impediments which the bringing of such suits would place on the Defendants in continuing to exercise the functions of their offices. (*Butz*, at pps. 521 and 527.)

Following the practical analysis one step further, suits brought as a counter-attack with the real purpose of affecting the outcome of pending governmental decisions against the Plaintiff in such a case are absolutely useless unless filed promptly. Also, civil suit would cause no impediment to official functions if mandatorily delayed until after the officials had left office.

If the issue is between allowing a President to be forced through civil trial while in office, or preventing that, there may be an unbridgeable gap between the majority and the dissent in *Butz*. But if the choice is one of requiring a *former* President to go through a civil trial, then there is a possible common ground. The instant case fully illustrates the distinction. (This is further discussed in Section II, below.)

D. Qualified Immunity Was Clearly Contemplated by the Framers Concerning Constitutional Violations by The President. This is Consistent with This Court's Decisions in *Butz* and *Scheuer*.

The Petitioners draw two analogies in urging that absolute immunity be allowed to them. One is to the Speech and Debate Clause of the Constitution concerning members of Congress; the other is to the line of cases, applied in part in *Butz*, providing absolute immunity to judicial and prosecutorial officers, and to quasi-judicial officers. Neither is applicable to the President.

The Constitution in terms mentions and grants absolute immunity only to members of Congress, and only in certain specified areas. The fact of this narrow and defined grant demonstrates that the Framers understood the concept and use of absolute immunity, and chose to apply it in that circumstance. Its presence there, and its absence elsewhere, suggest that the Framers made a deliberate choice. (See *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967).)

As the supreme law, the Constitution is capable of allowing a benefit in one area and not in others, though logically the two might seem similar. In *Baker* v. *Carr,* 389 US 186 (1962), this Court recognized that the "one man, one vote" rule applied through the 14th Amendment to all of the state legislatures, but did not apply to the Senate of the United States, because the Constitution expressly provided a different method for election of that body. As a matter of political logic, one man, one vote, is just as important for the election of a U.S. Senator as for any other official. But under the Constitution it does not apply in the former context. Therefore the Constitution is under no requirement from any source to extend to the President the kind of immunity it gives to Congress.

Regarding the absolute immunity granted to judicial and quasi-judicial officers, the Petitioners discuss it as if it were a matter of high visibility, or importance of issues being decided, or number of potential adversaries who might be aggrieved by the decision made. It is not based on those factors.

If these were the determining factors, then the Governor of Ohio or any other state would rank far higher on each of them, than inferior court judges in the federal, state and local systems. Yet the law is clear that the former possesses only qualified immunity (*Scheuer* v. *Rhodes,* 416 US 232 (1974)), while the latter possesses absolute immunity (*Pierson* v. *Ray,* 386 US 547 (1967)).

In a statement which the briefs so far filed have missed, the Framers stated their belief that the subsequent liability of a President after leaving office, would be as much, including civil liability, as a former Governor. "In this delicate and important

circumstance of personal liability, the President of Confederated America would stand on no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware." (*Federalist*, # 69.)

For common law immunity, it is the nature of the decision-making being done, namely judicial, which is the critical factor. And the President is not a judicial or quasi-judicial officer. Quite the contrary. The judicial power of the United States is vested by the Constitution in this Court and in such inferior Courts as the Congress may from time to time ordain and establish. (See Art. III, generally.)

Using this authority, Congress has enacted numerous laws creating both inferior Courts, and various forms of administrative judges and prosecutors, which this Court has termed quasi-judicial offices, and to which it extended absolute immunity in *Butz*. The cases are entirely consistent that the basis of this particular absolute immunity is in the common law, pre-existing the establishment of the government of the United States.

The President is not a congressional officer, entitled to the benefits of the Speech and Debate Clause. He also does not hold an office known to the common law. Therefore, both of the analogies which are drawn by the Petitioners are inapposite. If this Court is to grant absolute immunity to Presidents, it must do so for reasons having to do with that office, and not those having to do with offices in the other two co-equal branches of the government.

While few may doubt that it is in the nation's interest that all Presidents be "vigorous and fearless" in the performance of their duties, it reverses the Constitutional framework to suggest that it requires absolute immunity for the President, when his choice of action is to violate the Constitution itself. This is important when the Constitutional right violated is only that of an individual citizen, whether employee of the government or not. It is especially important when the violation of the individual's right is also an attack on the Constitutional powers of another branch of government, in this case the Congress.

In the First Amendment cases, the Court has long recognized the "chilling effect" on others of the diminution of one person's rights. This case represents a special application of that idea. The power of Congress both to raise taxes and to appropriate and spend the funds raised, is directly and seriously affected by the chilling effect of a decision against the Respondent in the instant case.

As part of their argument that a President requires absolute immunity, Petitioners note that Congress has delegated to the President, or to officials and agencies under his supervision and control, a host of functions, with the result that the President now directs an enormous federal bureaucracy that fundamentally affects every citizen. What is missing from that argument is that Congress has a Constitutional duty to oversee the spending of the money that supports that bureaucracy, a function which cannot be properly carried out if the President can interfere with the receipt of full and accurate information by Congress from members of that bureaucracy.

Even by the standards of present federal budgets, $2 billion is a serious amount of money. An unknown and unauthorized expenditure of such an amount is a serious concern to Congress. Therefore, suppression of receipt of such information in the future is a major concern to Congress in the exercise of the appropriations powers.

Petitioners also argue that the rare instances of successful civil suits against a President militate in favor of absolute immunity. If the competing interests in such cases were solely those of a President versus a private citizen, this argument might have some weight. But as the instant case demonstrates, there are circumstances in which the competing interests are those of the President and the Congress, with the individual being the focal point of the fight between these two branches of government. When the powers of Congress are clearly though indirectly at stake, there cannot be a presumption that the President is more important than the Congress. Therefore, this argument, whether or not it might be valid in other cases, has no application here.

Petitioners also argue that discovery in a civil suit such as this may threaten the integrity of the office of President. Again, the argument is incomplete. It does not admit of the possibility that the actions of a President himself may threaten the integrity of his office, and that impeachment, or criminal, or civil proceedings may be necessary to vindicate the integrity of the office.

Petitioners base much of the rationale for absolute immunity on the negative influence of civil damage liability on responsible decision-making. This ignores the fact that when the powers of Congress are involved, as here, such civil liability may have a positive influence, and it may be its absence that has a negative influence.

Petitioners argue that the checks and balances among co-equal branches of government are an essential part of our system of government, and offer this as a reason why the courts should not interfere with the President. Missing from this argument is the point that Congress cannot be co-equal, if its sources of information concerning whether its appropriations laws are being carried out can be curtailed by actions of the President. If those sources can be so curtailed, what effect does this have on the power of Congress, one of the two co-equal branches with the Executive?

The final argument of the Petitioners is that the absence of civil suits against a President for almost two hundred years suggests a conclusion that there is no such right. Rather than a recognition that the remedy did not exist, the lack of civil suits against Presidents until recently may only reflect the relative growth of the Executive Branch, both in numbers of employees and in billions of dollars being spent, a process that did not begin in earnest until the 1930's, and only became comparable in size to its present levels in the last two decades. It could also reflect that fact, coupled with a difference between Presidents.

There is a strong public policy underlying the immunity for which Petitioners argue. The policy is that the discretion of the President in a thousand matters is part of the purpose for which he is elected. As Edmund Burke said, "Your representative

owes you, not his industry only, but his judgment . . ." (Speech to the Electors of Bristol, 2 Nov. 1774.)

But a rule based on public policy can extend no farther than the policy underlying it. If Presidential discretion means any choice between alternatives which the President voluntarily makes, then there are no limits to the policy and no limits to the rule. But it also means that the President may choose to commit acts or make choices which are illegal or unconstitutional.

On the other hand, if Presidential discretion means choices exercised pursuant to powers granted to the President by the Constitution, or by Congress acting pursuant to the Constitution, then both the policy and the rule must be qualified.

Taxpayers Fund submits that the instant case demonstrates why both the policy and the rule are necessarily limited. The Constitution is careful to define the few instances in which any of the three branches of government can directly effect the operations of either of the others. Congress can impeach either a President or a Judge. The President can veto an act of Congress. The Court can declare unconstitutional acts of Congress or actions taken by the President, and so forth. The care with which the Framers define each of these, and the reasons they gave for each in the *Federalist*, lead to the conclusion that no interference by one branch in the activities of another was to be implied or permitted, other than those expressly stated.

If this is so, then the President has a right to suggest to Congress what legislation, including appropriations, it should consider (Art. II, § 3, first phrase), but he does not have any right to prevent Congress from carrying out its duties in appropriations, including receiving accurate information from government employees. The latter function is "necessary and proper" to Congress.

If interference with Congressional testimony is viewed as a direct attack by the President on the Constitutional powers of Congress, then the public policy does not give him discretion in that area. And if he has no discretion to protect in a case such

as this, he requires no immunity to protect it. The President actually has an affirmative duty to see that such information from the Executive Branch is provided as Congress may seek. The giving of such testimony is a Constitutional right of the witness under the First Amendment, and the receipt of it is a Constitutional right of Congress under Article I, §§ 7, 8 and 9.

It is noteworthy that the Framers specified in the Constitution the oath which the President should take, but were silent concerning oaths of Senators, Representatives, and Judges. By that oath, the President commits himself, "... to the best of my Ability, [to] preserve, protect and defend the Constitution of the United States." It is by custom, not requirement, that the same oath is taken by some other federal officials. Its mandate solely for the President supports the argument that the plenary discretion generally given the President did not include the discretion to violate the Constitution deliberately.

In the *Federalist,* the Framers devote two chapters to the necessity for the President to possess the "energy" to carry out his office. That word is their equivalent of the "vigorous and fearless" performance to which the Petitioners refer. Yet throughout that discussion the Framers make clear that the Executive, like the other two branches, is expected to remain within the Constitutional limits of his power. To the Framers, general discretion did not include the discretion to violate the Constitution. (See *Federalist,* ## 70, 71.)

II. THERE ARE STATUTORY OR COMMON LAW MEANS TO MINIMIZE THE PERCEIVED HARM FROM A CONCLUSION OF QUALIFIED IMMUNITY.

It is not uncommon for courts, when deciding cases of first impression, to note the potential problems which may arise from the decision being made, and to suggest that the legislature may choose by statute to avoid such consequences. It is only common sense for a court to do this, and both this Court and the highest courts of the several States have occasionally done so.

The majority in *Butz* notes that it was acting in an area where Congress had not spoken through any enactment. The dissent in *Butz* noted all of the problems which the bringing of such a civil suit against an official while he was in office would raise, the same problems which apply here, only with greater urgency where the Defendant might be a sitting President. Read together, the majority and the dissent in *Butz* offer the solution to the problem.

One Petitioner raises the possibility of actions such as the present one being delayed until after a President has left office. In fact, that occurred in this case. All of the Petitioners had become again private citizens when they were brought into this case as Defendants. In this case it was a matter of happenstance, in that the Respondent did not find out about the tape recordings which suggested the involvement of the Petitioners until after they had left office.

To the extent that Petitioners arguments are concerned with the disruption of the activities of a President or his advisors if sued while in office, there is a simple, statutory answer. In suits brought in federal court, if there is a federal Statute of Limitations, it governs. If there is no federal limitation on that particular action, then the applicable state limitation governs. Therefore, it would be possible for Congress in its discretion to establish a special Statute of Limitations for civil cases such as the instant one, which would prevent them from being brought until after the President who is allegedly involved, has left office, or alternatively to require an automatic stay for trial and/or discovery (but allowing preservation of evidence if required), for suits brought while a President is in office.

If this Court determines that a President has qualified immunity, and if Congress enacts such a law, citing as its reasons the ones discussed by the dissent in *Butz*, such a law would probably be found Constitutional. Both the interference with a sitting President, and the possibility of strike suits as counter-attacks against government decision-making would be restricted, if not eliminated, by such a statute.

That actually happened in the present case. The termination of the Respondent had long since taken place. The President was out of office. The genuine drawbacks which the dissent in *Butz* saw in such civil cases generally, did not occur or apply in the instant case. The prevention of these problems in future cases could be accomplished either by statute, as discussed above, or possibly by judicial decision. Should this Court be satisfied that the intention of the Framers was that no process, civil or criminal, should reach a President while he remains in office, it could so rule, and achieve the same result.

Finally, although the Petitioners argue that the Framers had in mind a total civil immunity for the President, the language of the Framers suggests otherwise. It was their clear intention that a President be liable for, "forfeiture of life and estate by subsequent prosecution in the common course of law." (*Federalist*, # 77.)

In addition to the statement quoted on page 14, wherein the Framers equate the subsequent liability of a President to that of Governors, this clear statement about subsequent criminal liability also leads to the conclusion that some civil liability would lie against a President after he was out of office. Since the Framers did not think that the possibility of a death penalty or loss of entire estate from criminal prosecution of a former President would prevent him from proper exercise of the duties and "energy" of his office, it follows that they would not consider the lesser harm of only partial financial loss to be such an impediment.[4]

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[4] Two final points presented by one Petitioner are that the discretionary decisions of hundreds of overworked district judges are an inadequate protection of a President prior to leaving office. This may be true, but it can readily be solved by statute as discussed above. Also, the Petitioner argues that the passage of time resulting in dimmed memories and the loss of evidence works against a Defendant. This is simply not true.

The burden of proof is on the Plaintiff. Especially with the extensive qualifications which *Butz* places on the right to bring such a civil suit, the loss of evidence by passage of time works severely against the Plaintiff.

CONCLUSION

Qualified immunity should be the standard concerning a civil suit against a President for violation of Constitutional rights, since that is all the protection which the President requires under the Constitution and all that he is entitled to. This is particularly true in a case such as the present one where the grant of absolute immunity would cause direct and serious harm to the Constitutional powers of the Congress, and indirectly to the taxpayers and the general public.

A determination that the standard should be qualified immunity does raise genuine and serious practical problems. But those can be largely or wholly resolved by statutory or common law limitations on the right, which can be established by Congress, or by this Court.

The proper conduct of the public business compels qualified immunity in this case.

Respectfully submitted,

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Nos. 79-1738 and 80-945

In the Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON, PETITIONER

v.

A. ERNEST FITZGERALD

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS

v.

A. ERNEST FITZGERALD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Prior to the filing of petitioners' briefs in these cases, the United States gave careful consideration to filing an amicus curiae brief supporting petitioners' claim of absolute immunity from civil damages liability. We concluded, however, that the government's recent submission in *Kissinger* v. *Halperin*, No. 79-880 (June 22, 1981), fully explicated the reasons justifying an absolute presidential and derivative

immunity from damages suits, and that formal amicus participation in these cases therefore was not necessary. Nonetheless, we wish now to reassert, particularly in view of the amicus curiae brief filed by seven members of Congress attacking the concept of presidential immunity, the United States' continuing commitment to, and interest in, the position advanced in our *Kissinger* submission, which the Court has on file, and to which we invite the Court's attention.[1]

The petitioners' brief in *Kissinger* (at 17-44) demonstrates that "[a]s the head of the Executive Branch of the federal government, the President, like the constitutional officers of the Legislative and Judicial Branches, must be free both of the fear of personal liability and of undue interference by coordinate parts of the government" (at 18). In addition, the *Kissinger* brief (at 44-50) explains that White House assistants are indispensable to the modern presidency and that the activities of these aides may also be cloaked with absolute immunity.

In sum, the United States continues to believe that the separation of powers and public policy considerations advanced in the petitioners' brief in *Kissinger* are correct.

Respectfully submitted.

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Solicitor General

NOVEMBER 1981

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[1]We are sending a copy of our *Kissinger* brief to the parties to these cases.

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